TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED NOVEMBER 16, 1905.

(19,991.)

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1 In the District Court of the United States for Porto Rico.

At an adjourned term of the District Court of the United States of America, within and for the District of Porto Rico, convened for and to be begun and holden at the court rooms of said court in the city of Mayaguez, on the fourth Monday of May, being the twenty-second day of that month, and subsequently adjourned by order of Court until the 24th day of said month, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

Present: The Honorable Chas. F. McKenna, Judge.

Among the proceedings had were the following, to wit:

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD CO. OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

Be it remembered that heretofore, to wit, on the 14th day of March, 1905, came the plaintiff by his attorney and filed in the clerk's office a complaint in this cause, which said complaint is as follows, to wit:

2 *Complaint.*

In the District Court of the United States in and for the District of Porto Rico.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD CO. OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

Julio P. Castro, a citizen of Porto Rico, residing at Cabo Rojo, Porto Rico, complains of the American Railroad Company of Porto Rico, a corporation existing under and by virtue of the laws of the State of New York, and for cause of action alleges:

That during all the times hereinafter mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, possessing, owning, operating a steam railroad in, over and upon the Island of Porto Rico, and more particularly a line of steam railroad between the towns of Mayaguez and San Germán, Porto Rico. That the said line of railroad possessed, owned and operated by the defendant, crosses a certain public highway leading from the said town of San Germán to the

said town of Mayaguez, at almost right angles; that the said crossing is called "El Paso de Nivel," said crossing being located at a point where the road from the town of Hormigueros runs into the said public highway, and situated about two hundred yards north of a certain bridge known and commonly called "San Antonio," said crossing being about two kilometers north of the point where the road from the town of Cabo Rojo runs into the aforesaid
3 public highway extending between the town of San Germán and Mayaguez as aforesaid.

Plaintiff states that on or about the eighteenth day of February, one thousand nine hundred and five, Eloisa Castro, unmarried, a minor of the age of seventeen years, more or less, daughter of the plaintiff, in company with her mother, Felica Cardona de Castro and Francisco Rodriguez, with two horses and coach, was riding along in a prudent and careful manner along said public highway, coming from the southwest, to the northeast, intending to pass over said railroad track at the aforesaid intersection of the railroad track and public highway, and going in the direction of the city of Mayaguez, Porto Rico; that when said Eloisa Castro was approaching said track in a careful and prudent manner and going at a very slow rate of speed, so as to avoid any danger, and without any negligence on her part or upon the part of her companions said Felicta Cardona de Castro and Francisco Rodriguez, and when upon said railroad track of the defendants, the defendants' engine, coaches and cars propelled by steam, as aforesaid, approached said public highway, coming from a northwesterly direction and going in a southeast-ly direction on said railroad track at an unusual and very great rate of speed, to wit, thirty miles per hour, and came upon and over said crossing and public highway without slowing up as required by law, or having given, or caused to be given, any warning of approach of said engine, coaches and cars, and without any flagman or other servant there stationed to warn people walking, passing or riding along said public highway over said crossing, of the approach of said engine, coaches and cars, and without ringing the bell or blowing the whistle on said locomotive engine as required by law, and which was then and there placed upon said locomotive engine, which was then and there propelling the said coaches and cars, and without having any
4 signs to warn the public that said railroad crossed the said public highway at that point, and without having any gates to keep persons, vehicles and the public from entering in and upon said tracks while the said engine, coaches and cars were passing over said highway, and without having any careful and prudent method or means of notifying the said Elosa Castro, or the public, of the approach of said engine, coaches and cars.

And the said defendants, then and there by its agents, servants and employés in charge of said engine, coaches and cars, so carelessly, negligently and improperly managed, moved and conducted the same, that by and through the carelessness, negligence and improper conduct of the defendant, by its agents, servants and employés in their behalf, said engine of said defendant, as said horses and said coach in which the said Eloisa Castro and said Felicia

Cardona de Castro and Francisco Rodriguez were riding, arrived at and upon said railroad track, then and there ran into and struck with great force and violence upon and against the said coach in which said Eloisa Castro was sitting, and which was passing over said railroad track, thereby throwing said Eloisa Castro and said Felicia Cardona de Castro and Francisco Rodriguez violently to the earth.

Plaintiff states that by reason of said collision caused by the negligence and carelessness of the agents, servants and employés of said defendant, in charge of said engine, coaches and cars, the said Eloisa Castro was so greatly bruised, mangled and hurt, that she died almost instantly after the said collision.

Plaintiff states that he has been damaged by the careless and negligent acts of the defendants' agents, servants and employés, as aforesaid, in causing the death of his daughter, the said Eloisa Castro, who at the time of her death and at all times prior thereto, had been making her home with plaintiff, in the sum of fifteen thou-
5 sand dollars ($15,000).

Wherefore, plaintiff asks judgment for fifteen thousand dollars ($15,000) and all costs herein incurred and expended.

FREDERICK L. CORNWELL.

Summons.

In the District Court of the United States for Porto Rico.

161, C. L.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO, a Corporation Existing Under and by Virtue of the Laws of the State of New York, Defendant.

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

The President of the United States of America to the American Railroad Company of Porto Rico, a corporation existing under and by virtue of the laws of the State of New York, defendant herein:

You are hereby notified that there has been filed in the Clerk's office of the aforesaid Court, a certain declaration by the above-named plaintiff against you, in which plaintiff claims damages against you for the sum of fifteen thousand dollars and costs, by reason of the death of Eloisa Castro, his daughter, caused by the negligence and carelessness of the company's employees in charge of the railroad train, while crossing the public highway running from Mayaguez to San Germán on or about the eighteenth day of February, A. D. 1905.

You are hereby required to appear and answer said declaration

within ten days from the date of service hereof, at the Clerk's
6 office of this Court at Mayaguez, Porto Rico, otherwise the said plaintiff will apply to the Court for the relief demanded in the said declaration, to wit, $15,000 and costs.

Witness the Honorable Chas. F. McKenna, Judge of the District Court of the United States for Porto Rico, this 16th day of March, A. D. 1905, at the city of Mayaguez, P. R.

[L. S.] H. H. SCOVILLE, *Clerk*,
By RICARDO NADAL, *Deputy*.

Return on Service Writ.

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I served the annexed writ on the therein-named American Railroad Company of Porto Rico by handing to and leaving a true copy thereof, together with a copy of complaint, with Mr. A. Duval, Gen'l Manager of the above company personally at San Juan, in said District, on the 22nd day of March, A. D. 1905.

____ ____,
U. S. Marshal.
JOHN L. HAAS,
Deputy.

Demurrer.

Filed March 31, 1905.

In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The above-named defendant, the American Railroad Com-
7 pany of Porto Rico, by its attorney F. H. Dexter, demurs to the complaint filed herein, and for cause of demurrer says:

(1) Plaintiff ought not to recover herein for the reason that the said complaint does not set forth a cause of action.

(2) For special grounds of demurrer defendant says that plaintiff ought not to recover for the reason that by the laws of Porto Rico plaintiff would be entitled only to support from the deceased daughter Eloiza Castro, if any right of action he may have at all; and that even if plaintiff should have a right of action for such support the same can be awarded only by monthly payments in advance; by reason of which this court is without jurisdiction to render a judgment in accordance with such law.

(3) Defendant further demurs to the said complaint for the reason that if any obligation existed upon the part of the deceased Eloiza

Castro to support her father, the plaintiff herein, such obligation ceased at the time of her death, and therefore plaintiff has no cause of action.

Wherefore, defendant prays that the said complaint be dismissed and that it be awarded its costs herein.

F. H. DEXTER,
Attorney for Defendant.

Objection to Jurisdiction of Court.

Filed May 23, 1905.

In the District Court of the United States for Porto Rico.

JULIO CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Defendant in the above-entitled action comes now by its attorney, F. H. Dexter, and objects to the jurisdiction of this court to try this cause under the terms and provisions of Section 670 of the
8 Revised Statutes of the United States, for the reason that all terms of this court held in the city of Mayaguez under and by the terms and provisions of the Act of March 12, 1900, creating a civil government in Porto Rico, and particularly the present term at which the above cause is set for trial, is a special term of this court, and therefore this court is without jurisdiction to try the issues in this cause by a jury.

Wherefore, defendant prays for an order either dismissing this cause or transferring the same for trial at a regular term of this court to be held at either San Juan or Ponce.

F. H. DEXTER,
Attorney for Defendant.

Journal Entry.

May 25, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The objections to the jurisdiction heretofore filed herein are heard and overruled in accordance with the formed opinion of the Court upon this question. The defendant excepts to said ruling. The demurrer to the complaint is heard and overruled, to which said defendant excepts. Thereupon comes said defendant and files an answer. Whereupon comes the plaintiff and files a demurrer to the said answer, which is heard and overruled, to which said plaintiff excepts.

9 *Answer.*

Filed May 25, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO, a Citizen of Porto Rico, Residing in the Town of Cabo Rojo, Porto Rico, Plaintiff,

vs.

AMERICAN RAILROAD — OF PORTO RICO, a Corporation Existing under and by Virtue of the Laws of the State of New York, Defendant.

For answer to the complaint filed in the above-entitled action, the defendant answers and alleges as follows:

1. Defendant denies all of the allegations in the said complaint contained, except that it is a corporation existing under and by virtue of the laws of the State of New York, and that at the time mentioned in the said complaint it operated a steam railroad in the Island of Porto Rico.

2. For a separate and further answer, the defendant alleges that the accident in the said complaint set forth was caused by the negligence of Eloisa Castro, whose death is alleged to have been the result of the same, Felicia Cardona de Castro, mother of the said Eloisa Castro, and Francisco Rodriguez, the coachman who was driving the horses attached to the coach described in plaintiff's complaint, which negligence consisted in the neglect and failure of the said Eloisa Castro, Felicia Cardona de Castro and Francisco Rodriguez to take the ordinary precautions incumbent upon prudent persons before crossing the track of defendant; and also because of their failure and neglect to heed the warnings and signals given by the employés of the train which caused said accident, and because of the failure of the said parties to stop, look and listen for the approach of said train, and because of their failure to heed the ringing of the
10 bell and the whistling of the locomotive attached to said train, and because of their reckless and negligent driving upon and across the track of defendant company in front of said train before the employés and agents of defendant company in charge thereof could, by the exercise of reasonable diligence, avoid the accident and injury set forth in said complaint, and because the said Eloisa Castro, the said Felicia Cardona de Castro and the said Francisco Rodriguez, each and all of them, had seen or knew of the immediate presence and approach of said train, and heard the same and the signals given by the engine driver in time to have avoided the accident if they had acted with ordinary care; by reason of all of which the said Eloisa Castro, Felicia Cardona de Castro and their agent and servant Francisco Rodriguez were guilty of contributory negligence, the same resulting in the accident complained of in plaintiff's complaint.

Wherefore defendant prays that said complaint be dismissed and that defendant have its costs and disbursements herein.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Demurrer to Answer.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO, Plaintiff,
vs.
THE AMERICAN R. R. CO. OF PORTO RICO, Defendant.

Now comes the plaintiff by his attorney F. L. Cornwell, and demurs to the answer of the defendant, and for reason states:

First. That in paragraph 1 it denies all the facts contained
11 in the complaint filed by the plaintiff except that defendant is a corporation existing under and by virtue of the laws of the State of New York, and that at the time mentioned it was operating a steam railroad in the Island of Porto Rico, all of which is inconsistent with the facts alleged in the second paragraph of the said answer, which admits that there was an accident and that the said Eloisa Castro was killed.

Second. That, that part of the answer beginning in the fourth line of the second page and continuing as follows: "And because of the failure of said parties to stop, look and listen for the approach of said train," does not constitute any defense, as the laws of Porto Rico do not require the public to stop, look and listen at a public railroad crossing.

Third. That the second paragraph of said answer does not constitute any defense, in that it does not allege affirmatively that the railroad company had provided the necessary gates, flagmen and other protection at the said crossing, as is required by law, and further that the defendant does not allege that the contributory negligence of the said Eloisa Castro, Felicia Cardona de Castro and Francisco Rodriguez, was gross, wanton or willful on their part.

F. L. CORNWELL,
Attorney for Plaintiff.

Journal Entry.

May 25, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes F. H. Dexter, attorney for the defendant, and moves that the name of Hon. Willis Sweet be entered as of counsel
12 for the defendant. Whereupon said cause is called for trial, and both sides answer ready. Whereupon the Marshal sum-

mons Fred Leser, Jr., William Falbe, E. Ramirez and Julio Mangual. Thereupon comes a jury composed of the following named persons, to wit: F. L. Cole, Adolfo Camps, R. L. Stratton, E. Sanchez, W. E. Moore, O. E. Rand, Theron Potts, F. Garcia, B. Sanchez, Fred Leser, Jr., E. Ramirez and Julio C. Mangual, and who are duly impaneled and sworn to try the case according to the testimony.

Journal Entry.

May 26, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears a part of the testimony on behalf of the plaintiff.

Journal Entry.

May 27, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. Now Comes F. H. Dexter, attorney for the defendant, and files a motion to have the jury visit the scene of the accident complained of in this case. The jury hears the conclusion of the testimony for the plaintiff.

13 *Journal Entry.*

May 29, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears part of the testimony on behalf of the defendant.

Journal Entry.

May 30, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears the conclusion of the testimony for the defendant.

Journal Entry.

May 31, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Resumed. The jury hears argument of counsel for both sides, the charge of the Court, and then retires. And thereafter the jury returns with the following verdict, to wit: "12 P. M. May 31, 1905. The jury finds a verdict for the plaintiff in the sum of $1,600 (sixteen hundred dollars). Frank L. Coleman, Foreman."

14 *Journal Entry.*

June 1, 1905.

No. 161.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Judgment.

This case coming on to be heard, the said parties appearing by their attorneys, the jury of twelve persons were regularly impaneled and sworn to try this action, and having heard the evidence, the argument of counsel and the instructions of the Court, retired to the jury room and thereafter returned a verdict for the plaintiff for the sum of sixteen hundred dollars.

It is therefore ordered and adjudged that the plaintiff have and recover from the defendant, the American Railroad Company of

Porto Rico, the sum of sixteen hundred dollars ($1,600), together with the costs of said action, and interest thereon from the date of this judgment at the rate of 6% per annum.

Made and entered on this 1st day of June, 1905.

Journal Entry.

June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes defendant herein, by F. H. Dexter of counsel, and files motion in arrest of judgment, which motion is heard and overruled.

Thereupon defendant files petition for extension of time for
15 filing assignment of errors and bill of exceptions. The Court grants until June 10th to file said assignment of errors and bill of exceptions, to which plaintiff excepts.

Motion in Arrest of Judgment.

Filed June 1, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Defendant, by its attorney F. H. Dexter and Willis Sweet of counsel, moves in arrest of judgment herein for the following reasons, to wit:

(1) Because this Court was without jurisdiction to try this cause before a jury, this term being a special term of Court, and not being a regular term provided for by Act of Congress of the United States, and particularly because of the provisions of Section 670 of the Revised Statutes of the United States.

(2) Because plaintiff has no cause of action herein, and because the demurrer of defendant to the complaint herein should have been sustained, since, by the law of Porto Rico, the only cause of action which plaintiff might have would be an action for support, and not an action for damages as prayed.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

16 *Motion.*

Filed June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Motion Requesting an Extension of Time for Filing Assignment of Errors and Bill of Exceptions.

Defendant respectfully represents to this Court that it is about to sue out a writ of error from the judgment of this Court rendered against it this day in the above-entitled cause, and that, owing to the contemplated adjournment of this Court within the next three days, it is a physical impossibility for defendants to prepare the assignment of errors and bill of exceptions for such writ of error.

Wherefore defendant prays that a reasonable time, not to exceed June 10th next, will be allowed it and its counsel for the preparation and filing of such assignment of errors and bill of exceptions.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Petition for Writ of Error.

Filed June 1, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

17 The American Railroad Company of Porto Rico, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the first day of June, 1905, comes now, by F. H. Dexter its attorney and Willis Sweet of counsel, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this Court be suspended and stayed until the decision of said writ of error by the Supreme Court of the United States.

And your petitioners will ever pray.

F. H. DEXTER,
Attorney for Defendant.

WILLIS SWEET,
Of Counsel.

Journal Entry.

June 1, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Order Allowing Writ of Error.

At this, the special term of this Court held in the City of Mayaguez on the first day of June, 1905, upon motion of F. H. Dexter, attorney for defendant, and Willis Sweet, of counsel, in the above-entitled cause, and upon filing a petition for a writ of error, it is ordered that a writ of error be, and hereby is allowed to have reviewed in the Supreme Court of the United States the judg-
18 ment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is fixed at the sum of four thousand dollars ($4,000), and upon the giving of the same and its approval by this Court and the Judge thereof within the time allowed by law, the same shall operate as a supersedeas and the judgment herein shall be stayed until otherwise ordered by the Supreme Court of the United States, to which plaintiff excepts.

CHAS. F. McKENNA, *Judge.*

Journal Entry.

June 8, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the defendant herein, by its attorney F. H. Dexter, and files a motion for an extension of time until the 20th of this month to file its assignment of errors and bill of exceptions herein, and said motion being considered, is granted.

Motion.

Filed June 8, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Motion of Defendant for an Extension of Time Within Which to File Assignment of Errors and Bill of Exceptions.

Comes now the defendant in the above-entitled cause, by its attorneys, F. H. Dexter, and represents that by the order of this Court

made on the first day of June it was allowed ten days from
19 such date to file its assignment of errors and bill of exceptions for the purposes of a writ of error herein to the Supreme Court of the United States. But defendant states that owing to the official duties of the stenographer of the Court he has been unable to write out and furnish to defendant or its counsel the transcript of the testimony taken by him during the trial hereof, and that it would be physically impossible for him to prepare the said transcript of said cause within the time limited as aforesaid, and that it would be impossible to so prepare it unless an additional time is granted.

Wherefore, defendant prays that it be allowed until the 20th of this month to file its assignment of errors and bill of exceptions.

F. H. DEXTER,
Attorney for Defendant.

Journal Entry.

June 15, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the plaintiff herein by N. B. K. Pettingill on behalf of F. L. Cornwell, attorney for plaintiff, and files a motion to vacate an order heretofore entered herein extending the time for filing bill of exceptions by defendant. Said motion is heard and submitted.

20 *Motion to Vacate Order.*

Filed June 15, 1905.

In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes the plaintiff, by his attorney F. L. Cornwell, and moves to vacate and set aside the order entered herein on the — day of June, 1905, extending the time allowed to defendant for settling its bill of particulars (exceptions) herein, on the ground that said order of extension was made after the final adjournment of the term of this Court at which the judgment appealed from was entered, and hence was improvidently granted because beyond the power of the Court.

F. L. CORNWELL,
Attorney for Plaintiff.

Journal Entry.

June 16, 1905.

JULIP P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

The motion heretofore filed in the above-entitled case to vacate the order extending time for filing bill of exceptions having been taken under advisement, said motion is overruled.

21 *Journal Entry.*

June 19, 1905.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Now comes F. H. Dexter, attorney for the defendant in the above-entitled cause, and files its assignment of errors, and the bill of exceptions is signed and settled.

22 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Bill of Exceptions.

This cause came on for hearing before the Honorable Charles F. McKenna, Judge, and a jury.

Present: Messrs. Horton & Cornwell, Attorneys for plaintiff, and F. H. Dexter and Willis Sweet, Attorneys for defendant, when the following proceedings were had, to-wit:

During the course of the trial and at the beginning thereof, during the testimony of the first witness, José Remote y Fajardo, the question was asked by counsel for plaintiff, of the witness: "Is there or is there not a gate there?" referring to the crossing of the highway over the railway of defendant company where the accident occurred.

Counsel for defendant objected to this question for the reason that there was no obligation on the part of the railroad company, defendant, to maintain either a guard or a gate at the cross-
23 ing, which objection the Court overruled and allowed the witness to answer: "No, sir."

The Court said in ruling upon the objection made by counsel for defendant: "I will admit that subject to a renewal of the objection later. At the conclusion of the case, the jury will be given a recess and the law questions will be heard and discussed then. You may except now to the ruling."

To which ruling of the Court, the defendant, by its counsel, excepted.

During the progress of the trial and in the testimony of various witnesses, the following proceedings were had and took place:

In the testimony of the witness Don Mateo Fajardo, he was asked by counsel for plaintiff, upon his examination in chief: "Do you know of any other accidents at this crossing, Mr. Fajardo?" to which question counsel for defendant objected and the court allowed the same to be answered. Whereupon, counsel for defendant duly excepted to the ruling of the court.

During the examination of the witness Celso Leon, counsel for plaintiff, in the examination in chief, asked: "At that crossing, state whether or not there ever was a gate and watchman?" Which question was objected to by counsel for defendant because the defendant company was not under obligation to maintain a gate or watchman at the said crossing, which objection the court overruled and defendant, by its counsel, then and there duly excepted.

In the examination of the witness Isaac Gonzalez, counsel
24 for plaintiff, in the examination in chief, asked the said witness: "State whether or not there was a watchman there?" To which question counsel for defendant objected, which objection was by the court overruled, and to which ruling counsel for the defendant company then and there duly excepted.

After hearing all the evidence and the argument of counsel, the court delivered the following charge:

GENTLEMEN OF THE JURY: I congratulate you on the approach of the termination of this protracted case, and I at the same time want to congratulate the attorneys for what I consider the very able and very thorough and excellent manner in which they have conducted the case and elicited the testimony and for their able presentation of the law and facts in the case as viewed by them respectively. They are the aids, gentlemen; counsel are employed to aid the court and the jury in throwing light on the presentation of the law and facts in the case as viewed by them respectively. They are the aids, gentlemen; counsel are employed to aid the court and the jury in throwing light on the presentation of the law and the facts of a given case. They are necessary and grow out of the fact that if we did not have counsel to present cases, every person who was injured would be obliged to conduct his own case, and hence cases would not be tried so thoroughly or as efficiently and the law that grows out of these cases would not be collected and presented to juries and courts with the clearness and the satisfaction they are now.

25 After all that light from the witnesses and the counsel and the authorities presented, your duties and mine begin, and that is on my part to present to you the views of the law as they have arisen in the case, and it is your part to take that view and that

construction of the law and apply it to the facts as you may find them according to the witnesses, it being emphatically and exclusively, not only your right, but your duty to scrutinize the testimony, and particularly the credibility of each witness' story; the probability of it, the opportunities of seeing, the intelligence, the capacity, the understanding, the interest or the bias, if you find it, and motives and inducements affecting the testimony of any witness. It is your duty, after hearing the testimony and seeing the witnesses, to consider and apply your conclusions to each and every witness and apply it in the determination of this case.

Now, gentlemen of the jury, this case has attracted very considerable attention in Porto Rico, but the questions involved are familiar and similar cases are of most frequent occurrence unfortunately in the United States, because both the State Courts and the Federal Courts are filled with cases known as grade crossing cases; known as negligent cases, known as contributory negligence cases, so that the principles involved are very familiar to courts and to lawyers. Of course the facts of each case differ and the law in its application is governed largely of course by the facts. Terms are used here which it is necessary for me to explain to you the legal definition of.

26 This is an action of negligence, known as an action for negligence for the wrongful killing of the daughter of the plaintiff in this case at the crossing, as has been testified to here, the wrongful and negligent action being this, as charged in the complaint. It is charged by the plaintiff,—and testimony has been offered in support of it—that this railroad company chartered under the laws of Porto Rico and operating in pursuance of the laws of Porto Rico, was obligated and bound by those laws to maintain at a crossing in evidence here, a watchman and a gate to prevent accidents. They complied with that law, according to the evidence, for two or three years, several years possibly, but in August, 1899, at the time of the devastating cyclone on this island, the watchman's house was destroyed and the gate injured, and from that time to the present, so far as the evidence is concerned in this case, neither the watchman nor the gate at that crossing was restored or maintained.

It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part

27 of this company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character.

The proof tends to show, and is set up here by the defense, that these requirements of the common law and requirements of the statute of Porto Rico were complied with, and that in that they were not negligent. That, in turn, is contested by conflicting testimony on the part of the plaintiff, but in reference to the gate and the watchman, the company stands here acknowledged and admitted failing to comply with that part of the law in requiring them to maintain a watchman and gate at that crossing. The other provisions of the law they say they have complied with, and offer testimony tending to support that.

That testimony is for you to consider in connection with the testimony in answer to it, offered by the plaintiff, denying that the whistle blew or that the bell was rung or that the train slacked up. You saw the witnesses; you heard their testimony; you heard their description of the circumstances of this unfortunate disaster, the striking of the carriage, the stopping of the train some distance beyond the crossing. All those circumstances were detailed with great minuteness before you, and it is for you, gentlemen, to take the testimony of both sides, of all the witnesses detailing those circumstances, and to consider and apply it to this case.

Now, the plaintiff contends as a matter of law—and asked
28 me to so charge,—that the failure to maintain the watchman and the gate and continue them there at the crossing was such a failure of law, violation of law, such a flagrant neglect of duty on the part of this defendant that, no matter if plaintiff himself, by his driver, was guilty of contributory negligence, that the action would not be barred or defeated on that account.

It is proper to explain to you, gentlemen, that in all actions for negligence, including this, the general principle is that a party bringing a suit for negligence must himself be absolutely free from negligence, no matter how negligent the defendant has been. Ordinarily the rule is that courts and juries are not allowed to measure which is the more negligent, hence if any degree of negligence in ordinary cases is shown to have been occasioned by the plaintiff, his right of action is barred and defeated. That is the general rule of negligence cases. But in this case a different rule prevails and it is proper for you to apply it.

Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself. Now, notwithstanding the negligence of the railway company, the plaintiff,—and the plaintiff here is represented, there is no dispute about it, by his agent, the driver. The driver or coachman is considered the agent, and, in that connection, any of his acts of negligence, incompetence or want of skill or anything of that kind are visted upon the plaintiff, and for the purposes of this case, his conduct, and his action, if reckless,
if wanton, if in disregard of ordinary prudence, ordinary
29 precautions of a prudent man, all of those things, if he was guilty of them, inure against the plaintiff, and if the driver was guilty of gross negligence or wantonly crossed that track, when by stopping a few moments he had time to see, if he chose to whip

up his horses and run the risk of crossing that track, in that case, gentlemen, if you find that was the fact, there can be no recovery whatever against this defendant. Because that would be such gross, wanton and reckless conduct on the part of the driver, which would be visited on the plaintiff, as to defeat this action.

Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, wilful or wanton, but that by the exercise of ordinary common sense, ordinary precautions, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could have checked his horses, and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence. It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence in not looking up and down the track or stopping when he got close enough to the track to see it. You would be justified and it would be your duty, if you believed the testimony on that subject, to take the testimony on that subject into consideration in cutting down or mitigating any damages you may be disposed to allow in the case. Now I hope you catch the distinction. If the
30 action of the driver, from the evidence, was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate accident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact.

On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, not to defeat the entire action, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less.

Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are not of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age. And in the State Courts and Courts of the United States, the measure of damages allowed is what would be the earning power of a child until he was twenty-one years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant. This suit presents the case of a young lady seventeen years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about
31 entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position and all that we heard no testimony on. In the measure of damages, if there is

any, earning power which he would be entitled to would be one element of damages. There is no proof offered on the subject of the pecuniary value of this girl's life. I mean in the earning power. You cannot estimate, indeed it would be abhorrent to proper sentiments and good feeling to put a measure of damages upon affectionate daughter, wife or child. They are not looked upon as horses or cattle; you say they are worth so much. The law does not allow you to say the girl is worth $15,000 or $20,000. All those terms of the valuation of human life are repugnant and are not the measures that the law allows for ascertaining the value, or the loss rather, of a human life under these circumstances. The rules governing the allowance of damage in a case of this kind for a daughter are fixed by the courts in many cases, and I shall read to you what the courts say upon that subject so that you will not be carried away by any feeling or mistaken sentiments because the courts have fixed upon the jury and lawyers and upon other courts the rules governing them, and I could not allow you, under those laws, to take this case and make up your verdict from your sweet fancy in any amount you see fit.

While you are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which
32 prevent anything like conjecture or guess work.

The court has said that damages should be confined to the pecuniary loss suffered by the mother,—in a case where a mother brought a suit for the loss of her son—and the loss of the comfort, society, support and protection of the deceased.

Now those seem to be the limitations put upon the allowance of damages here; the comfort and the society, the support and protection of deceased, and you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him and he enjoyed her society, which would be natural, and death has deprived him of that.

You will observe, gentlemen of the jury, that the law is very limited in its enumeration of allowances in such a case as this, the comfort, the loss of society and the protection. Nothing is to be allowed, by the terms of the law, for the mental anguish of the parent or grief. That seems to be eliminated from it. Of course in the enumeration of these points here, these decisions, the loss of the society might cover that. The loss of the society of such a child as this young lady was described, the comfort and the pleasure and the enjoyment are matters that the jury will have to apply that rule to, confined to those elements of damages. It is entirely limited to that. As I said before, I don't recall any testimony here about the pecuniary loss that the father sustained in this case. No evidence was offered on that subject and I cannot state that, in the absence
33 of any evidence on that subject, you are at liberty to go into the domain of conjecture in reference to the pecuniary loss that has been sustained, there being no proof on that subject. But there is proof and evidence growing out of the circumstances of this case for you to take into consideration, if damages are adjudged by

you to be proper in the case under the evidence, as to the loss of companionship and society and comfort of this young lady to her father, the affection existing between them.

No, gentlemen of the jury, the testimony has been rehearsed to you so fully that I won't pretend to retail or allude to that. My function is discharged when I have laid down the principles of law, as I take them, applicable to this case, and lest I might overlook some of the principles of law, the counsel on both sides have asked that I give you certain instructions which they have prepared, bearing upon the case, and I will read those points that I have affirmed, and they will probably cover any points that I have omitted in my charge.

The defendant, before the jury retired, excepted to the following parts of the foregoing charge, to-wit:

"It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it
34 being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part of the company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character."

Also to that part of the charge as follows: "Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself."

The foregoing exceptions were stated by the defendant at the time to be based upon the fact that no law of Porto Rico at the time of the accident required the maintenance of a gate or watchman at the crossing where the accident occurred. And defendant insists that the court erred in holding that the police law of railroads, which was in force in Spanish times, was continued after the American occupation, for the reason that its provisions and terms were entirely inconsistent with the new government created by the Organic Act of April 12, 1900, by reason of which said so-called police law of railroads was impossible of application and enforcement.

Also defendant excepted to that part of the charge as follows:

"Now, if from the evidence you find that the driver was not
35 guilty of negligence to such an extent as to justify you in finding that it was gross, wilful or wanton, but that by the exercise of ordinary common sense, ordinary precaution, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could

have checked his horses and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence."

Also to that part of the charge as follows: "If the action of the driver, from the evidence, was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate accident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact."

"On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, *then you have a right to take that into consideration, not to defeat the entire action, but to affect the* extent of damages and make the damages, if you find any *were suffered, correspondingly less.*"

Also to the action of the court, during the progress of said charge, in reading from a law book upon the measure of damages,
36 to the effect that damages are limited to the loss of comfort and society of the deceased.

Thereafter, and upon the conclusion of the said charge, the court ave the following instructions in behalf of plaintiff, which were n and there excepted to by the defendant.

First. If you find a verdict in favor of the plaintiff, in determing the amount of the damages, you are instructed as follows:

The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, and take into consideration the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they could place upon her in future years. And you may take into consideration all these things in determining what the plaintiff- should receive as compensation for the loss they have received.

Answer. Gentlemen, that is the law properly stated and I affirm that point.

Second. The laws of Porto Rico require that where railroads cross other roads on the same level, gates shall be constructed which shall only be opened when vehicles and cattle cross the track, and if the jury believe from all the evidence in the case that the point
37 where the accident happened was at the crossing of the public highway, extending between San German and Mayaguez, and the defendant's railroad tracks, and that at this crossing there were no gates as required by law, and that if the gates had been there and had been closed as the coach containing the deceased approached the

said crossing, the accident would not have happened, then the jury will return a verdict for the plaintiff.

Answer. That point is affirmed. If the gate was up and closed and all, it is for you to determine whether, as a matter of facts the accident would have happened at all.

Third. The burden of proof of contributory negligence is on the defendant and must be proved by a preponderance of evidence.

Answer. That point is affirmed. The defense set up here is that the plaintiffs themselves were guilty of contributory negligence and not entitled to recover. Having undertaken to prove that, the burden is upon the plaintiff to prove it by a preponderance of the evidence. That does not mean the greater number of witnesses. You have a right to observe the character of the witnesses, their greater or less degrees of intelligence, their interest, their motives and greater opportunities for observing. You pass upon those questions in determining the question of preponderance of evidence.

Defendant then and there, and before the jury retired, requested of the court the following instruction:

(5) The court instructs the jury that at this railroad crossing the train of defendant company had the right of way and the
38 agents and employés of defendant in charge thereof were held to the exercise of only ordinary care and diligence to avoid accidents at such crossing. And if you believe from the evidence that the fireman and engineer on the train which caused the accident gave the warning whistles and rang the bell as testified to by them, and upon the engineer seeing the coach at about fifty meters distant from the crossing, both he and the fireman did all that they could reasonably do to stop the train and avoid the collision, then you will find for the defendant.

Which instruction the court refused to give as requested, but modified it as follows:

Answer. This instruction is affirmed, with the qualification however, that the full performance of all duties imposed by law and the exercise of ordinary care to prevent the accident by stopping the train before the collision and accident, did not relieve defendant company from the further duty imposed by law to maintain a gate and watchman at said crossing as precautions to prevent accidents at crossing. Nor did absence of gate and watchman at crossing by defendant, facts, if well known for several years to the coachman and at time of accident, if you so find from the testimony, did not relieve plaintiffs from the exercise of ordinary care, and if the coachman of plaintiff attempted to cross tracks, knowing and seeing no gate there, he was guilty of such contributory negligence, which, if jury finds to be only the want of ordinary care and negligence, should operate to reduce and mitigate amount of damages to plain-
39 tiff, if any are to be found by the jury. If the jury, however, should find that the driver of plaintiff, on approaching the tracks at the crossing and well knowing and observing no gate to be maintained at said crossing, undertook without stopping or looking for trains on the track, and that the said driver of plaintiff whipped his horses and undertook to so cross the tracks under said circum-

stances in evidence, such action of driver would be such reckless, rash and gross negligence as to entirely defeat the right of plaintiff to recover in this action. Rash, wanton or gross negligence in law operates to defeat a plaintiff's right to recover, but it is the duty of the jury and not of the court to find the facts and circumstances in evidence alleged to constitute either ordinary or gross, wanton negligence of plaintiff's driver.

Also because the court refused to give the following instruction asked by defendant:

(6) If you believe from the evidence that the coachman Rodriguez stopped at any place before reaching the crossing at a point where he could not see nor hear the approaching train and then started to cross the track without again stopping, looking or listening at any point up the track itself, where, under the evidence, you may believe that he could have seen or heard the approaching train, this conduct on the part of the coachman was reckless and wanton and made him guilty of contributory negligence, notwithstanding you believe from the evidence that no chain, gate or watchman were at said crossing.

40 Which instruction the court modified as follows:

Answer. Affirmed with same qualifications as specified in the foregong point regarding failure of duty of defendant under the law to maintain a gate and watchman at the crossing, and the correlative obligation of plaintiff's driver with knowledge of years and seeing at time the removal of gate, to exercise a degree of ordinary care and prudence at so dangerous a crossing as the evidence tends to prove the one in dispute in.

Defendant excepted to the action of the Court in refusing to give instruction No. 9 asked by it as follows:

(9.) The court instructs the jury that defendant company was not obliged by law to maintain a chain, gate or watchman at the crossing where the accident occurred and that it and its servants and employés in the operation of the trains were only held to the exercise of ordinary diligence in avoiding accident at that place.

The above instruction was modified by the court as follows:

Answer. Under existing laws of Porto Rico continued under the express provisions of the Foraker Law and amendments, under which Congress of United States created government of Porto Rico, the police regulation governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of United States and of Porto Rico, never having been repealed. This point as stated is refused.

41 Defendant excepted to the action of the court in refusing to give instruction No. 10 asked by it as follows:

(10.) As to ordinary diligence and the ordinary and reasonably safe appliances, the court is asked to instruct the jury that they will take into consideration the character of the railway, the purposes for which it was used, the general nature of the country and the demands of the people, and you are instructed that under all those circumstances defendant company was only required to use ordinary safe appliances and locomotives and cars and was not required

to have as high a degree of perfection as may exist in the best railways of the world.

Which instruction the court modified as follows:

Answer. All this instruction is affirmed as law, but with the qualification that all this care, caution and exercise of high order of care by defendant must be considered with reference to the duty imposed by law to maintain a gate at the grade crossing in question and the failure of duty of defendant to maintain said gate.

Defendant also excepted to the action of the court in refusing to give instruction No. 11 asked by it as follows:

(11.) The jury are instructed that if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.

42 You are further instructed that in awarding damages you are not at liberty to allow damages on the ground of sympathy, sentiment or speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of the evidence.

Which instruction the court modified as follows:

Answer. The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed.

The defendant further prayed the court for a peremptory instruction in favor of defendant, which instruction the court refused to give.

To all of which rulings, defendant at the time duly excepted.

The jury thereupon retired to consider their verdict, and, having returned into court a verdict for plaintiff for the sum of sixteen hundred dollars ($1600.), a motion for new trial and in arrest of judgment was filed by defendant, which said motion for new trial and in arrest of judgment was overruled.

And now, in furtherance of justice and that right may be done the defendant, it tenders and presents the foregoing as its bill of exceptions to the action of the court, and prays that the same

43 be allowed and settled and signed and sealed by the court and made a part of the record, and the same is accordingly done this 19th day of June, A. D. 1905.

CHAS. F. McKENNA, *Judge.*

44 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to-wit:

1.

That the Court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of Section 670 of the Revised Statutes of the United States, the District Court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said Court begun and held at the city of Mayaguez aforesaid.

2.

That the Court erred in overruling defendant's demurrer to the complaint.

45 3.

That the Court erred in overruling the objection of counsel for defendant to the following question: "Is there or is there not a gate there?" asked of the witness José Remote y Fajardo.

Also in overruling the objection of counsel for defendant to the following question: "Do you know of any other accidents at this crossing, Mr. Fajardo?" asked of the witness Don Mateo Fajardo.

Also in overruling the objection of counsel for the defendant to the following question: "At that crossing state whether or not there ever was a gate and watchman?" asked of the witness Celso Leon.

Also in overruling the objection of counsel for the defendant to the following question: "State whether or not there was a watchman there?" asked of the witness Isaac Gonzalez.

4.

That the Court erred in giving the following instructions during the course of the charge to the jury:

"It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the

crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing
46 there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part of the company. It required duties that are known in other States as common law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character."

"Now, we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself."

"Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, wilful and wanton, but by the exercise of ordinary common sense, ordinary precaution, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off, whatever the testimony was, and he could have checked his horses and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence. It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence in not looking up and down the track or stopping when he got close enough to the track to see it. You would be justified and it would be your duty, if you believe the testimony on that subject, to take the testimony on that subject into consideration in cutting down or mitigating any
47 damages you may be disposed to allow in the case."

"If the action of the driver, from the evidence was rash, wanton, wilful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate acident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact. On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, not to defeat the entire action, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less."

5.

That the Court erred in reading from a law book upon the measure of damages, during the course of said charge, to the effect that damages are limited to the loss of comfort and society of the deceased.

6.

That the Court erred in giving the following instructions requested by the plaintiff, together with modifications:

First. If you find a verdict in favor of the plaintiff, in determining the amount of the damages, you are instructed as follows:

48 The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, and take into consideration the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they could place upon her in future years. And you may take into consideration all these things in determining what the plaintiff should receive as compensation for the loss they have received.

Answer. Gentlemen, that is the law properly stated and I affirm that point.

Second. The laws of Porto Rico require that where railroads cross other roads on the same level, gates shall be constructed which shall only be opened when vehicles and cattle cross the track, and if the jury believe from all the evidence in the case that the point where the accident happened was at the crossing of the public highway, extending between San German and Mayaguez, and the defendant's railroad tracks, and that at this crossing there were no gates as required by law, and that if the gates had been there and had been closed as the coach containing the deceased approached the said crossing, the accident would not have happened, then the jury will return a verdict for the plaintiff.

49 Answer. That point is affirmed. If the gate was up and closed and all, it is your duty to determine whether, as a matter of fact, from the evidence, the accident would have happened at all.

Third. The burden of proof of contributory negligence is on the defendant and must be proved by a preponderance of evidence.

Answer. That point is affirmed. The defense set up here is that the plaintiffs themselves were guilty of contributory negligence and not entitled to recover. Having undertaken to prove that, the burden is upon the plaintiff to prove it by a preponderance of the evidence. That does not mean the greater number of witnesses. You have a right to observe the character of the witnesses, their greater or less degrees of intelligence, their interest, their motives and greater opportunities for observing. You pass upon those questions in determining the question of preponderance of evidence.

7.

That the Court erred in refusing to give to the jury the following instructions requested by defendant and in modifying same.

5. The Court instructs the jury that at this railroad crossing the train of defendant Company had the right of way and the agents and employés of defendant in charge thereof were held to the exercise of only ordinary care and diligence to avoid accidents at such crossings. And if you believe from the evidence that the fireman

and engineer on the train which caused the accident gave the warning whistles and rang the bell as testified to by them, and upon the engineer seeing the coach at about fifty metres distant from
50 the crossing both he and the fireman did all that they could reasonably do to stop the train and avoid the collision, then you will find for the defendant.

Which instruction the Court modified as follows:

Answer. This instruction is affirmed, with the qualification however, that the full performance of all duties imposed by law and the exercise of ordinary care to prevent the accident by stopping the train before the collision and accident, did not relieve defendant company from the further duty imposed by law to maintain a gate and watchman at said crossing as precautions to prevent accidents at crossing. Nor did absence of gate and watchman at crossing by defendant, facts, if well known for several years to the coachman and at time of accident, if you so find from the testimony, did not relieve plaintiffs from the exercise of ordinary care, and if the coachman of plaintiff attempted to cross tracks, knowing and seeing no gate there, he was guilty of such contributory negligence, which, if jury finds to be only the want of ordinary care and negligence, should operate to reduce and mitigate amount of damages to plaintiff, if any are to be found by the jury. If the jury, however, should find that the driver of plaintiff, on approaching the tracks at the crossing and well knowing and observing no gate to be maintained at said crossing, undertook without stopping or looking for trains on the track, and that the said driver of plaintiff whipped his horses and undertook to so cross the tracks under said circumstances in evidence, such action of driver would be such reckless, rash and
51 gross negligence as to entirely defeat the right of plaintiff to recover in this action. Rash, wanton or gross negligence in law operates to defeat a plaintiff's right to recover, but it is the duty of the jury and not of the Court to find the fact and circumstances in evidence alleged to constitute either ordinary or gross, wanton negligence of plaintiff's driver.

(6) If you believe from the evidence that the coachman Rodriguez stopped at any place before reaching the crossing at a point where he could not see nor hear the approaching train and then started to cross the track without again stopping, looking or listening at any point up to the track itself, where, under the evidence, you may believe that he could have seen or heard the approaching train, this conduct on the part of the coachman was reckless and wanton and made him guilty of contributory negligence, notwithstanding you believe from the evidence that no chain, gate or watchman were at said crossing.

Which instruction the Court modified as follows:

Answer. Affirmed with same qualifications as specified in the foregoing point regarding failure of duty of defendant under the law to maintain a gate and watchman at the crossing, and the correlative obligation of plaintiff's driver with knowledge of years and seeing at time the removal of gate, to exercise a degree of ordinary care and prudence at so dangerous a crossing as the evidence tends to prove the one in dispute is.

52 (9) The Court instructs the jury that defendant company was not obliged by law to maintain a chain, gate or watchman at the crossing where the accident occurred and that it and its servants and employés in the operation of the trains were only held to the exercise of ordinary diligence in avoiding accident at that place.

Which instructions the Court modified as follows:

Under existing laws of Porto Rico continued under the express provisions of the Foraker Law and amendments, under which Congress of the United States created government of Porto Rico, the police regulations governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of United States and of Porto Rico, never having been repealed. This point as stated is refused.

(10) As to ordinary diligence and the ordinary and reasonably safe appliances, the Court is asked to instruct the jury that they will take into consideration the character of the railway, the purposes for which it was used, the general nature of the country and the demands of the people, and you are instructed that under all those circumstances defendant company was only required to use ordinary safe appliances and locomotives and cars and was not required to have as high a degree of perfection as may exist in the best railways of the world.

Which instruction the Court modified as follows:

53 Answer. All this instruction is affirmed as law, but with the qualification that all this care, caution and exercise of high order of care by defendant must be considered with reference to the duty imposed by law to maintain a gate at the grade crossing in question and the failure of duty of defendant to maintain said gate.

(11) The jury are instructed that if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.

You are further instructed that in awarding damages you are not at liberty to allow damages on the ground of sympathy, sentiment of speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of the evidence.

Which instruction the Court modified as follows:

Answer. The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed.

8.

That the Court erred in entering judgment in favor of the plaintiff and against defendant for the sum of sixteen hundred
54 dollars ($1600.00).

Wherefore the defendant prays that the judgment of the said District Court of the United States for Porto Rico be reversed.

F. H. DEXTER,
Attorney for Defendant.

55 JULIO P. CASTRO
v.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Writ of Error.

The President of the United States to the Honorable the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico before you between The American Railroad Company of Porto Rico, Plaintiff in Error, and Julio P. Castro, Defendant in Error, a manifest error hath happened to the great damage of the said American Railroad Company of Porto Rico, Plaintiff in Error, as by its complaint appears.

We being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington at this the October Term 1905 of the Supreme Court of the United States, then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and
56 customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this seventeenth day of October, nineteen hundred and five. *Nunc pro tunc* as of June first 1905.

No seal.

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.
By EDWARD GRINDROD, *Deputy.*

Allowed by
CHAS. F. McKENNA,
Judge of the District Court of the United States for Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

I hereby certify that a copy hereof has been lodged in my office.
H. H. SCOVILLE, *Clerk.*

57 [Endorsed:] Julio P. Castro *v.* American Railroad Company of Porto Rico. Writ of Error. Filed Clerk's Office, United States District Court. Oct. 17 1905. *Nunc pro tunc* as of June 1st, 1905. H. H. Scoville, Clerk of the Court. By Edw. Grindrod, Deputy. F. H. Dexter Attorneys and Counsellors at Law. San Juan, Porto Rico, W. I.

58 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

JULIO P. CASTRO
v.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Citation.

The President of the United States to Julio P. Castro and Messrs. Horton & Cornwell, his attorneys, Greeting.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., at the first day of the next October Term thereof, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for Porto Rico, in the case wherein The American Railroad Company of Porto Rico is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness The Honorable Charles F. McKenna, Judge of the District Court of the United States for Porto Rico this 14th day of October, 1905.

CHAS. F. McKENNA,
Judge of the District Court of the United States for Porto Rico.

Attest:

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE, *Clerk,*
By EDW. GRINDROD, *Deputy.*

59 *Return on Service Writ.*

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I have served the annexed Citation on the therein-named Horton & Cornwell by handing to and leaving a true and correct copy thereof with F. L. Cornwell, a member of the said firm of Horton & Cornwell personally at Mayaguez in said District on the 19th day of October, A. D. 1905.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

60 [Endorsed:] Julio P. Castro *v.* American R. R. Co. of Porto Rico. Citation. Filed Clerk's Office, United States District Court. Oct. 14, 1905. H. H. Scoville, Clerk of the Court. By Edw. Grindrod, Deputy. F. H. Dexter Attorney and Counsellor at Law San Juan, Porto Rico, W. I.

61 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, hereby certify that the above and foregoing transcript, containing 54 pages, from 1 to 54 inclusive, is a true and correct transcript of the record and proceedings in the cause entitled therein between Julio P. Castro and the American Railroad Company of Porto Rico, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute- the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand, and affixed the seal of said District Court this the sixth day of November, A. D. 1905.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk District Court of the United States for Porto Rico.

62 In the District Court of the United States for Porto Rico.

JULIO P. CASTRO
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Bond of Writ of Error.

Know all men by these presents, that we, the American Railroad Company of Porto Rico, as principal, and A. Duval and Vicente Fano as sureties, are held and firmly bound unto Julio P. Castro, plaintiff above named, in the sum of four thousand dollars ($4,000.-00), to be paid to the said Julio P. Castro, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the seventeenth day of June, 1905.

Whereas, the above named defendant, the American Railroad Company of Porto Rico, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the District Court of the United States for Porto Rico.

Now, therefore, the condition of this obligation is such that if the above named American Railroad Company of Porto Rico shall prosecute said writ to effect and answer all costs and damages, if it shall

fail to make good its plea, then this obligation shall be void;
63 otherwise to remain in full force and virtue.

AMERICAN RAILROAD COMPANY
OF PORTO RICO,
By A. DUVAL, *Manager.*
A. DUVAL.
VICENTE FANO.

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

A. Duval and Vicente Fano, being duly sworn upon their oaths, respectively, say that they are each worth the sum of four thousand dollars ($4,000.00) in visible property in Porto Rico, over and above all liabilities and exemptions.

A. DUVAL.
VICENTE FANO.

Subscribed and sworn to before me this 17th day of June, 1905.

[COURT SEAL.] H. H. SCOVILLE,
Clerk District Court of the
United States for Porto Rico.

This bond approved this 17th day of June, 1905.
CHAS. F. McKENNA, *Judge.*

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing is a true copy of the "Bond on Writ of Error" filed in the case of Julio P. Castro *vs.* American Railroad Company of Porto Rico.

Witness my official signature and the seal of said Court at San Juan, in said District, this 23d day of November, A. D. 1905, and in the 130th year of the Independence of the United States of America.

[Seal United States District Court for the
District of Porto Rico.]

H. H. SCOVILLE, *Clerk.*

64 [Endorsed:] 489, 19991. 489, 19991, Dec. 9, '05.

65 [Endorsed:] File No. 19,991. Supreme Court U. S. October Term, 1905. Term No. 489. Julio P. Castro, P'l'ff in Error, *vs.* American R. R. Co. of Porto Rico. Writ of Error Bond. Filed Dec. 8", 1905.

Endorsed on cover: File No. 19,991. Porto Rico D. C. U. S. Term No. 151. The American Railroad Company of Porto Rico, plaintiff in error, *vs.* Julio P. Castro. Filed November 16th, 1905. File No. 19,991.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 14 1907
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

FRANCIS H. DEXTER,
FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24745

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This case comes before this court upon a writ of error addressed to the District Court of the United States for Porto Rico (30) to review a judgment of that court entered June 1, 1905, in favor of Julio P. Castro, the plaintiff below and defendant in error here, for the sum of sixteen hundred dollars (9).

The action, which is in case, was begun in said district court on March 14, 1905, by filing in the clerk's office of said court for the district of Mayaguez a declaration wherein

the plaintiff Castro, "a citizen of Porto Rico," alleged that by reason of the negligence of the American Railroad Company of Porto Rico, "a corporation *existing* under and by virtue of the laws of the State of New York," his unmarried daughter, Eloisa, a minor, seventeen (17) years of age, had been run over and killed by a train of said company at a certain unprotected grade crossing on its line.

The accident occurred on the 18th day of February, 1905. The deceased, Eloisa, while riding with her mother, Felicia Cardone de Castro, in a certain coach driven by Francisco Rodriguez, attempted to pass over the tracks of the defendant company at the intersection of the public highway therewith, when the coach was run into by one of defendant's steam-engines drawing a train of cars.

Plaintiff, among other supposed derelictions on the part of defendant, alleged that it was particularly negligent in that its servants failed to give any warning of the approach of said engine and train towards said crossing, and in failing to have "any flagman or other servant" stationed at said crossing to warn passers-by of the approach of said train, and also in failing to maintain at the point in question "any gates to keep persons, vehicles, and the public from entering in and upon said tracks while the said engine, coaches, and cars were passing over said highway;" by reason whereof the collision complained of occurred, and "the said Eloisa Castro was so greatly bruised, mangled, and hurt that she died almost instantly after the said collision," and plaintiff suffered damage by "the careless and negligent acts of the defendant's agents, servants, and employees, as aforesaid, in causing the death of his said daughter, the said Eloisa Castro, who at the time of her death and at all times prior thereto had been making her home with plaintiff, in the sum of fifteen thousand dollars ($15,000) (2, 3).

The summons served upon the defendant required it to appear and answer said declaration "at the clerk's office of this court at Mayaguez, Porto Rico" (4).

The defendant appeared in obedience to the summons and interposed a demurrer to the declaration, setting forth three grounds of objection thereto, viz:

(1st.) That said declaration did "not set forth a cause of action."

(2d.) That plaintiff ought not to recover against defendant for the reason that "by the laws of Porto Rico plaintiff would be entitled only to support from the deceased daughter, Eloisa Castro, if any right of action he may have at all," and that such support, if any right of action to recover the same existed, could only be awarded to plaintiff "by monthly payments in advance."

(3d.) That any right to support which said plaintiff may have had, so far as the deceased, Eloisa, is concerned, ceased at her death (4, 5).

Subsequently defendant filed a plea to the jurisdiction of the court sitting at Mayaguez to try the cause, asserting that under and by virtue of the terms and provisions of section 670 of the Revised Statutes of the United States, read in connection with the provisions of the act of March 12, 1900, commonly called the Foraker act, the terms of the District Court of the United States for the District of Porto Rico authorized to be held at Mayaguez were but "special terms," and that said court when holding such terms was without jurisdiction to empanel a jury (5). The plea to the jurisdiction came on for hearing before the Honorable Charles F. McKenna, district judge, "at an adjourned term of the District Court of the United States of America within and for the District of Porto Rico convened for and to be begun and holden at the court-rooms of said court, in the city of Mayaguez," on the 24th day of May, 1905 (1), and the same having been overruled and exception to such action of the court having been noted, defendant's demurrer to the

declaration was considered and overruled, and to this action of the court defendant also noted an exception (5). Subsequently, defendant admitting that it was a corporation "existing under and by virtue of the laws of the State of New York, and that at the time mentioned in the said complaint it operated a steam railroad in the island of Porto Rico," pleaded in effect the general issue and also pleaded specially contributory negligence on the part of the deceased and her companions in recklessly driving upon the defendant's right of way in front of the advancing train (6). To certain features of this plea plaintiff interposed a demurrer (7), which demurrer was overruled (5). Thereupon a jury was duly empaneled and sworn (8), and testimony having been submitted on behalf of both parties, the cause was argued to the jury by counsel for each; and the jury, having been charged by the court, on May 31, 1905, returned a verdict for the plaintiff in the sum of sixteen hundred dollars ($1,600.00) (9).

On the next day, namely, June 1, 1905, the defendant, by its attorneys, filed a motion in arrest of judgment based upon the grounds following, viz:

(1st.) That the court "was without jurisdiction to try this cause before a jury, this term being a *special term* of court, and not being a regular term provided by act of Congress of the United States, and particularly because of the provisions of section 670 of the Revised Statutes of the United States."

(2d.) "Because plaintiff has no cause of action herein," * * * "since by the law of Porto Rico the only cause of action which plaintiff might have would be an action for support, and not an action for damages, as prayed" (10).

This motion in arrest of judgment was heard and overruled the same day (10).

In the course of charging the jury the trial judge, among other things, said:

> "Now, gentlemen of the jury, this case has attracted very considerable attention in Porto Rico, but the questions involved are familiar and similar cases are of most frequent occurrence unfortunately in the United States, because both the State courts and the Federal courts are filled with cases known as grade-crossing cases, known as negligence cases, known as contributory-negligence cases, so that the principles involved are very familiar to courts and to lawyers." * * * "It is charged by the plaintiff—and testimony has been offered in support—that this railroad company chartered under the laws of *Porto Rico* (New York) and operating in pursuance of the laws of Porto Rico, was obligated and bound by those laws to maintain at the crossing in evidence here, a watchman and a gate to prevent accidents. They complied with that law, according to the evidence, for two or three years, several years possibly, but in August, 1899, at the time of the devastating cyclone on this island, the watchman's house was destroyed and the gate injured, and from that time to the present, so far as the evidence is concerned in this case, neither the watchman nor the gate at that crossing was restored or maintained.
>
> "It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed, been complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that [it] made this company liable to the plaintiff for damages" (16) * * *
>
> "That, * * * in reference to the gate and the watchman, the company stands here acknowledged and admitted failing to comply with that part of the

law in requiring them to maintain a watchman and a gate at that crossing.

"Now, the plaintiff contends as a matter of law—and asked me to so charge—that the failure to maintain the watchman and the gate and continue them at the crossing was such a failure of law, violation of law, such a flagrant neglect of duty on the part of this defendant that, no matter if plaintiff himself, by his driver, was guilty of contributory negligence, the action would not be barred or defeated on that account." * * *

"Now we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself" * * * (17).

"Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are *not* of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age. And in the State courts and courts of the United States, the measure of damages allowed is what would be the earning power of a child until he was 21 years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant. This suit presents the case of a young lady 17 years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position and all that we heard no testimony on (18). In the measure of damages, if there is any, the earning power which he would be entitled to would be one of the elements of damages. There is no proof offered on the subject of the pecuniary value of this girl's life. I mean in the earning power." * * *

"While you are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which prevent anything like conjecture or guesswork." * * *

> * * * "Now those seem to be the limitations put upon the allowance of damages here; the comfort and the society, the support and protection of deceased, and you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him and he enjoyed her society, which would be natural, and death has deprived him of that." * * * "As I said before, I do not recall any testimony here about the pecuniary loss that the father sustained in this case. No evidence was offered on that subject and I cannot state that, in the absence of any evidence on that subject, you are at liberty to go into the domain of conjecture in reference to the pecuniary loss that has been sustained, there being no proof on that subject. But there is proof and evidence growing out of the circumstances of this case for you to take into consideration, if damages are adjudged by (19) you to be proper in the case under the evidence, as to the loss of companionship and the society and comfort of this young lady to her father, the affection existing between them" (20).

Before the jury retired defendant excepted to so much of the court's charge, above set forth, as related to any supposed obligation on the part of the defendant under the laws of Porto Rico to maintain a gate across the crossing and a watchman to attend the same, and particularly to so much of said charge as declared that "the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, is negligence in itself," such exception being specifically based upon the fact "that no law of Porto Rico at the time of the accident required the maintenance of a gate or watchman at the crossing where the accident occurred" (20).

Defendant also excepted to so much of said charge as instructed the jury that—

> "a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another, (and) that such damages may be given as, under all the circumstances of the case, may be just. And in determining this

> question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, * * * the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they should place upon her in future years. And you may take into consideration all these things in determining what the plaintiff should receive as compensation for" his loss (21).

Before the jury retired the defendant requested the court to instruct the jury "that defendant company was not obliged by law to maintain a chain, gate, or watchman at the crossing where the accident occurred, and that it and its servants and employees in the operation of the trains were only (to be) held to the exercise of ordinary diligence in avoiding accident at that place." This request was refused, and in lieu thereof the court gave the following instruction:

> "Under existing laws of Porto Rico, continued under the express provisions of the Foraker law and amendments, under which Congress of the United States created government of Porto Rico, the police regulation governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of the United States and of Porto Rico, never having been repealed."

To this action of the court defendant duly excepted (23).

Defendant further requested the court to instruct the jury that—

> "if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.
>
> "You are further instructed that in awarding damages you are not at liberty to allow damages on the

> ground of sympathy, sentiment or speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of evidence."

This instruction, as asked, was refused by the court, but the same was given with the following modification:

> "The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed."

To the action of the court in this particular defendant also duly excepted (24).

Assignments of Error.

Among other errors assigned on behalf of the American Railroad Company of Porto Rico defendant in the court below, are the following:

1.

"That the court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of section 670 of the Revised Statutes of the United States, the District Court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said court begun and held at the city of Mayaguez aforesaid" (25).

2.

"The court erred in overruling defendant's demurrer to the complaint" (25).

4.

Error on the part of the court in instructing the jury that defendant company was obliged by the existing law of Porto Rico to maintain and operate a gate at and across the crossing in question and that the failure of said company to maintain such a gate and watchman, as required by law, was negligence *per se* (26).

Error on the part of the court in so much of its charge to the jury as asserted the right of a father under the laws of Porto Rico to maintain an action for the death of his minor child caused by the wrongful act or neglect of another, and that in such a case "such damages may be given as, under all the circumstances of the case, be just, and that in determining such question the jury should take into consideration all the circumstances of the case, the age of the deceased, the kind of girl she was," * * * "the assistance that she might have been to the parents in future years, and * * * "the loss of society and comfort and the reliance that they could place upon her in future years" (27).

9.

Error on the part of the court in instructing the jury to the effect that the police laws and regulations of Porto Rico governing the operation of railroads and requiring the maintenance of gates at railroad crossings was continued in force by the express provisions of the Foraker law and amendments, and that said police regulations were compatible with the laws of the United States and of Porto Rico and had never been repealed.

11.

Error on the part of the court in refusing to instruct the jury, as requested by defendant, that if they should find for the plaintiff they should "only allow such damages as have

been proven in the case," and if plaintiff had "not been deprived of any financial support or assistance by reason of the death of his said daughter," then no damages should be awarded to plaintiff on such account, and also in modifying such request for instruction and giving the same as modified to the effect that if they found for the plaintiff at all they should "allow such damages as you may, under the evidence and circumstances, consider as just" (24).

Jurisdiction.

On appeal to or writ of error from this court to review a decree or judgment of the District Court of the United States for Porto Rico this court has the power and it is its duty, first, to determine the question of its own jurisdiction in the premises, and, secondly, the jurisdiction of the lower court to render the judgment sought to be reviewed.

As the jurisdiction of the United States District Court for Porto Rico depends solely upon the proper interpretation and the application of the acts of the Congress in that behalf enacted, and as under the terms of such acts this court has jurisdiction to review the decrees and judgments of said district court in all cases where an act of Congress is brought in question and the right claimed thereunder is denied, it would seem that this court has jurisdiction to review any judgment of the District Court for Porto Rico in any cause wherein the jurisdictional power of said district court to render such judgment is alleged to have been exercised contrary to the provisions of the statutes upon which the right to render judgment depends, if it exists at all.

In the present case the jurisdictional power of the trial court to hear and determine, at a *special term* of said court held at Mayaguez, the issues raised by the pleadings was expressly drawn in question by a timely plea interposed on behalf of the defendant, and the right of the defendant under the provisions of section 670 of the Revised Statutes of

the United States, extended to Porto Rico by the act of April 12, 1900 (31 Stat., 85, c. 191), to be exempt from trial before a jury empaneled in the Mayaguez district, so asserted, was expressly denied.

As this court has jurisdiction on appeal or writ of error to review the judgments of the United States District Court for Porto Rico in all cases in which it would have jurisdiction to review the judgments of a supreme court of a Territory, and also in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied (act of April 12, 1900, *ubi supra*), it would seem to be reasonably clear that defendant in error's motion to dismiss the writ of error herein, which is now pending before this court, should be denied.

AS TO THE JURISDICTION OF THE DISTRICT COURT OF PORTO RICO.

Did the District Court of the United States for the District of Porto Rico have jurisdiction to hear and determine this cause?

Section 34 of the act of April 12, 1900 (*ubi supra*), declares that:

> "The District Court of the United States for Porto Rico" * * * "shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, *and shall proceed therein in the same manner as a circuit court.*"

The jurisdiction so conferred was amplified by the provisions of the act of March 2, 1901 (31 Stats. L., 953), section 3 of which reads as follows:

> "That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth,

> nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

As appears from the first paragraph of the declaration, which contains the averment of citizenship, upon which the sole right of the District Court of the United States for Porto Rico to maintain the action depends, discloses the fact that the plaintiff is a citizen of Porto Rico, who possessed no right in himself to invoke the jurisdiction of said court. Jurisdiction must be sustained, if at all, upon the ground that the party defendant, the American Railroad Company of Porto Rico, which is averred to be "a corporation existing under and by virtue of the laws of the State of New York," is a *citizen of the United States* within the purview of the last above quoted statute.

If the principles underlying the decision of this court in the case of the United States *vs.* Northern Express Company, 164 U. S., 687, apply here, then the trial court, in so far as the case at bar is concerned, probably had jurisdiction of the cause; but if such principles are not applicable to the present case, then the trial court was without any jurisdiction whatever in the premises and the cause should have been dismissed. Such course not having been pursued, this court is possessed of jurisdiction and power to reverse the judgment of the lower court and remand the same with instructions to enter such judgment of dismissal.

But, assuming for purposes of argument that the cause was one of which the United States District Court for Porto Rico had cognizance by reason of the citizenship of one of the parties, did that court have jurisdiction to hear and de-

termine such cause at a *special term* of the court held at Mayaguez?

In establishing the District Court of the United States for Porto Rico, section 34 of the act of April 12, 1900 (*ubi supra*) also provided that—

> "regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and *special terms may be held at Mayaguez* at such other stated times as said judge may deem expedient."

Said district court, by the very terms of the act which established it, is required to proceed in all cases of which it has cognizance "in the same manner as a circuit court," and as two qualities of terms which said court may hold, namely, "regular terms" and "special terms," are expressly provided for, it is necessary to ascertain in what manner a circuit court of the United States under the statutes in force on April 12, 1900, or thereafter could proceed when holding a special term.

The law of the United States bearing upon this point, which was in force both on April 12, 1900, and at all times thereafter up to the present moment, is section 670 of the Revised Statutes of the United States, which reads as follows:

> "At any special term of a circuit court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin, any business may be transacted which might be transacted at any regular term of such court. At any special term of a circuit court in any other district, it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motions for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other pro-

> ceedings, in all cases pending in the circuit court, *except trying any case by a jury* in the same way and with the same effect as the same might be done at any regular session of said court."

Under section 34 of the act of April 12, 1900, Porto Rico is constituted "a judicial district, to be called 'the District of Porto Rico.'" As such it is a district "other" than a district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin.

By section 14 of said act of April 12, 1900, the statutory laws of the United States not locally inapplicable, and except as expressly otherwise provided, are declared to have the same force and effect in Porto Rico as in the United States.

Section 670 of the Revised Statutes of the United States, above quoted, is a law of general application not locally inapplicable, and it would seem to restrict and control the proceedings of the District Court of the United States for Porto Rico, sitting within the district of Porto Rico, as sharply and precisely as it restricts and controls the proceedings of any circuit court of the United States sitting in any judicial district not lying within the excepted States specifically named therein.

At the date of the passage of the act of April 12, 1900, the distinction between "general" terms and "special" terms in the practice and procedure of the circuit courts in the United States was well known to Congress, and when that body deliberately provided for both kinds of terms it must be presumed to have employed its words of definition in their technical sense and with due regard to the provisions of existing and applicable laws.

It is respectfully submitted, therefore, that the defendant's plea denying the jurisdictional power of the district court for Porto Rico to try the issues involved in this case before a jury at a "special" term of said court holden at Mayaguez

should have been sustained. The refusal of the trial court to heed such plea, it is submitted, constitutes reversible error.

Merits.

In the case of Perez *vs.* Fernandez, 202 U. S., 80, 91-92, this court, among other things, said:

> "Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights (*Kepner v. United States,* 195 U. S., 100, 122). This policy has been followed in dealing with Porto Ricans (President's message, December 5, 1899; Walton's Civil Law in Spain and Spanish America, 594). The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act (31 Stat., 77). Section 8 of that act provides: 'That the law and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States.'" * * *

First. Under the laws of Porto Rico can an action be maintained by the father of a deceased minor child whose death was caused by the negligence of another to recover in a lump sum damages for the injury which he may have sustained by reason of such death?

Second. If so, did the trial judge correctly charge the jury as to the respective duties and obligations of the parties connected with the accident or concerned in the cause of action, and as to the measure of the damages to be awarded to plaintiff under the local law, in case he was found to be entitled to recover?

The first of these questions was squarely raised by defendant's demurrer to the complaint (4), and re-raised by its motion in arrest of judgment (10), both of which were overruled by the court (5, 10). Such action of the trial court was duly assigned for error (25).

The solution of the second question depends upon the propriety and effect of various portions of the court's charge which were duly excepted to, the overruling of such exceptions having been duly assigned for error.

FIRST.

The Civil Code of Porto Rico approved March 1, 1902, which became effective upon its approval (Garrozi *vs.* Dastas, decided January 7, 1907), contained, among other provisions, the following, viz:

"BOOK FOURTH, TITLE I, CHAPTER I.

"Obligations and Contracts. Obligations.

"General Provisions.

"SECTION 1055. Every obligation consists in giving, doing, or not doing something.

"SECTION 1056. Obligations are created by law, by contracts, by quasi-contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs.

"SECTION 1057. Obligations arising from law are not presumed. Those expressly determined in this Code or in special laws are the only demandable ones,

and they shall be governed by the provisions of the laws which may have established them and by those of this book in regard to what has not been prescribed by said laws.

"SECTION 1059. Civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code.

"SECTION 1060. Those arising from acts or omissions, in which faults or negligence, not punished by law, occur, shall be subject to the provisions of chapter second of title sixteen of this book."

"TITLE XVI, CHAPTER II.

"Obligations Which Arise from Fault or Negligence.

"SECTION 1803. *A person* who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"SECTION 1804. The obligation imposed by the preceding section is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

* * * * * * *

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

* * * * * * *

"The liability referred to in this section shall cease when the persons mentioned therein prove that they employed all the diligence of a good father or a family to avoid the damage."

The Code of Civil Procedure of Porto Rico approved March 10, 1904, which went into effect July 1, 1904, among other provisions concerning the "Parties to Civil Actions," contains the following:

"SECTION 51. Every action must be prosecuted in the name of the real party in interest, except as other-

wise provided in this Code. Appearance in court shall be made through an attorney legally empowered to exercise his profession under the provisions of this law."

"SECTION 60. A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

Section 61 provides that—

"In every action under this * * * section such damages may be given as under all the circumstances of the case be just."

Prior to the adoption of the Code of Civil Procedure of 1904 an action to recover damages as such, for the death of a minor child which had been caused by the negligence of another, was unknown to the law of Porto Rico.

SECOND.

Assuming, however, that under the provisions of said Code of Civil Procedure the plaintiff, Castro, was capable of maintaining the present action, what of the administration of the cause by the trial court?

Referring again to the case of Perez *vs.* Fernandez, 202 U. S., 80, 96, it is said that—

"* * * Section 34 of the Foraker act established a United States District Court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a district court of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and provides that it shall proceed therein in the same manner as a circuit court, the intention of

> Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both district and circuit courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: 'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' The act of August 13, 1888 (25 Stat., 433), provides that the circuit courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the district court exercising the jurisdiction of a circuit court, in analogy to the powers of the circuit courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law."

It was conceded at the trial that the defendant company had not maintained a bar (barrera) or gate and a watchman at the crossing in question, and the trial judge instructed the jury that the failure on the part of defendant so to do constituted negligence *per se*.

The propriety of such instruction depends upon whether any statute or any municipal regulation having the force of law imposed upon the defendant company the duty of maintaining a gate and watchman at the intersection of its line of railway with a public highway.

The plaintiff contended at the trial that the Police Law of

Railroads of Porto Rico, approved January 13, 1888, and promulgated in the island February 17, 1888, and the regulations for the application thereof, also promulgated February 17, 1888 (War Department translation, 1899), were in force at the time of the accident complained of, and enjoined upon defendant the duty of maintaining both a gate and a watchman at said crossing.

Article 8 of title II of said Police Law of Railroads is as follows:

> "The railroads throughout their length shall be fenced on both sides. The *Secretary of the Colonies, after hearing the company,* if there be one, shall determine for such line the manner in which and the time when the fencing is to be made. When railroads cross others on the same level, gates shall be constructed which shall be closed and only opened when vehicles and cattle cross as provided for in the regulations."

The corresponding article of the regulations for the application of the Police Law of Railroads is as follows:

> "The owners or conductors of vehicles, horses, or other cattle may not, even to enter adjoining lands or to leave them, cross the railroads, but by such points fixed for that purpose. This prohibition includes also owners or drivers of carriages, shepherds and cattle men who leave their horses or cattle at liberty, and graze them in the zones adjoining the railroad."

The defendant, however, contended, and here contends, that said Police Law of Railroads and the regulations governing its application constituted a part of the political administrative code of Porto Rico in force prior to the American occupation; that they related to and affected only railroads which had been constructed and continued to be operated in the island of Porto Rico under a *government*

subvention, the enjoyment of which subvention carried with it the obligation of submitting to *government supervision and control.* A careful consideration of the detailed provisions of such law and regulations will plainly disclose the great difficulty, if not impossibility, of executing them in their entirety, caused by the change of political administrative control. For instance, the provision in article 8 of the law above quoted to the effect that *"the secretary of the colonies* * * * shall determine for such line the manner in which and the time when the fencing is to be made," was impossible of execution at the date of the accident here, because the Spanish secretary of the colonies referred to by the statute no longer had executive power in the premises, and no one had been designated by congressional or other proper authority to perform in his place and stead the functions pertaining to such office. In a similar manner article 7 of title II provides for the doing of certain acts "by the *governor of the province,"* and in other articles of the same law many other duties of various sorts and kinds are imposed upon the "governor of the province" and the "secretary of the colonies" and the "general government" which are not compatible with the changed conditions incident to changed political control.

This Police Law of Railroads was a necessary adjunct to the political power of Spain as it existed in the island of Porto Rico. In the absence of that political power, or a substitute therefor, this law became incapable of enforcement, and since the American occupation no law of railroads or municipal regulation bearing upon the point here at issue has been enacted. In the absence of such a law or such a regulation having the force and effect of law, it is respectfully submitted that the true rule governing the obligation of the railroad company was that it should have been held in law to the exercise of ordinary care and caution only in running its trains across the highway at the point of accident, and it was therefore error on the part of the trial court to

charge the jury that the failure to provide a gate and a watchman—their presence not being required by the terms of any existing law or any regulation having the effect of law—was negligence *per se*.

As to the Measure of Damages.

The references by the trial judge, in the course of his charge to the jury on this subject, to the principles which govern "in the State courts and courts of the United States" in similar cases was clearly erroneous and well calculated to confuse the faculties of gentlemen who had scarcely been made acquainted with the fact that such a body as a jury had any part or place in the administration of law.

The learned trial judge charged the jury, among other things, as follows:

> "Now, gentlemen of the jury, coming to the question of damages, these kinds of actions are *not* of very frequent occurrence in most of the States of the Union. They are brought to recover the loss of the prospective earning power of a minor. Parents are entitled in most of the States to whatever their children earn until they are twenty-one years of age."
>
> "This suit presents the case of a young lady 17 years of age, the daughter of a respected citizen, a young lady who had graduated from school, was about entering society. There is no evidence here for your consideration, that I heard, about any pecuniary value that the father expected to reap from her. Her station, position, and all that we heard no testimony on." * * * "There is no proof offered on the subject of the pecuniary value of this girl's life, I mean in the earning power." * * *

In practically the same breath he further charged with emphasis that—

> "in the State courts and courts of the United States, the measure of damages allowed is what would be the

> earning power of a child until he was 21 years of age, less the cost of maintenance, assuming him to be wrongfully killed by the negligence of the defendant."

Referring specifically to the plaintiff, he further charged that—

> "In the measure of damages, if there is any, the earning power which he would be entitled to would be one of the elements of damages."

If this action should have been maintained at all it is plain that only such damages could have been awarded "as under all the circumstances of the case be just," and it is plain that the jury, after having been told specifically that there was no testimony in the cause upon which an estimate of the earning power of the deceased could be based, and none "about any pecuniary value that the father expected to reap from her," should not have been instructed that in the United States "the measure of damages allowed is what would be the earning power of a child until he was 21 years of age, less the cost of maintenance, *assuming him to be wrongfully killed by the negligence of the defendant.*"

The law of the United States and the law of Porto Rico as to the ownership of the earnings of minors are distinctly opposed in principle. In the former, generally speaking, such earnings belong to the parent—the head of the household. In the latter the earnings and property of a minor are expressly declared by law to belong to the minor, *e. g.*—

"CIVIL CODE OF PORTO RICO.

> "Article 160. The ownership of property which a child not emancipated may have acquired, *or acquires by its work or industry or for any good consideration, is vested in the child*, and the usufruct in the father or mother who has him or her under his or her authority and in his or her company; but if the child, with the consent of the parents, lives independently of them, he or she shall be considered as emancipated

for all purposes with regard to said property and shall own it and enjoy the usufruct and administration thereof.

"Art. 161. The ownership and usufruct of what the child acquires *with the capital of his or her parents* is vested in the latter; but should the parents expressly assign to him or her the whole or a part of the profits which he or she may obtain, such profits shall not be chargeable to the latter in the inheritance."

"Art. 162. The ownership or usufruct of the property or income donated or left by will to a child not emancipated, to cover the cost of his or her education and instruction, is vested in him or her; but the father or the mother shall have the administration thereof if no other proviso has been made in the gifts or bequests, in which case the will of the donors shall be strictly observed.

"Art. 163. The parents have, with regard to the property of the children, the usufruct or administration of which belongs to them, *the obligations of every usufructuary or administrator* and the special obligations established by section 3, title 5, of the mortgage law."

It is true that the learned judge further along charged that—

"While you (the jury) are governed and required by the statutes of Porto Rico to render just damages, if you find damages are to be allowed, those just damages are controlled by rules and regulations which prevent anything like conjecture or guess work."

"The court has said that damages should be confined to the pecuniary loss suffered by the mother—in a case where a mother brought a suit for the loss of her son—and the loss of the comfort, society, *support* and protection of the deceased."

And again as follows:

"Now these seem to be the limitations put upon the allowance of damages here: the comfort and the society, the *support* and protection of deceased, and

> you heard the testimony on that subject; that the father had educated this young lady; that she was a comfort to him, and he enjoyed her society, which would be natural, and death has deprived him of that."

And still again, at the express request of the plaintiff, the court charged that—

> "The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when such death is caused by the wrongful act or neglect of another; that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, *the kind of a girl she was,* and take into consideration *the assistance that she might have been to her parents in future years,* and you may also consider the loss of society and comfort and *the reliance they could place upon her in future years.* And you may take into consideration *all these things* in determining what the plaintiff should receive as compensation for the loss they have received" (20).

In view of the provisions of the Porto Rico Code as to the ownership of the earnings of minors, and also as to the emancipation of females by marriage and the like, and also in view of the fact that, in addition to permitting the jury to consider "*the assistance* that she might have been *to the parents* in future years," the court neglected to charge the jury to consider the cost of her maintenance during those same "future years," it would seem that the verdict of the jury should not be sustained.

As to the Contributory Negligence of the Plaintiff.

The trial judge charged the jury that the driver of the coach in which deceased was riding at the time of the accident was the agent of plaintiff, and his negligence or want of skill

"inures against the plaintiff," "and if the driver was guilty of gross negligence or wantonly crossed that track * * * if he chose to whip up his horses and run the risk of crossing that track, * * * there can be no recovery whatever against this defendant. Because that would be such gross, wanton and reckless conduct on the part of the driver, which would be visited on the plaintiff, as to defeat this action.

"Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, willful or wanton, but that by the exercise of ordinary common sense, ordinary precautions, he had time when he got within a certain distance of the railroad track to see it, five feet or ten feet off * * * and he could have checked his horses, *and he neglected to look up the track or take any precautions*, if you find that, *that would be a minor degree of negligence.* It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence *in not looking up and down the track or stopping when he got close enough to the track to see it.* * * * Now I hope you catch the distinction. If the action of the driver from the evidence, was rash, wanton, willful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, * * * then that was such reckless and wanton conduct as would defeat the action entirely and your verdict would be for the defendant if you find that fact.

"On the other hand, if you find *a lesser degree of* negligence, *amounting to which is called want of ordinary care* that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, *not to defeat the entire action*, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less" (18).

To this portion of the charge the defendant also seasonably excepted (21), and the overruling of such exception was assigned for error (26).

In New York Central R. R. Co. *vs.* Lockwood, 17 Wallace, 357, 382, this court adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence, saying:

> "If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities."

In Briggs *vs.* Spaulding, 141 U. S., 132, 147, this court, citing Percy *vs.* Millandon, 8 Mart., N. S., 68, then "a leading case for more than sixty years," said

> "that the correct mode of ascertaining whether an agent is in fault is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed upon him. That diligence and care must again depend upon the nature of the undertaking. There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect."

In Schofield *vs.* Chicago, Mil. & St. Paul Ry. Co., 114 U. S., 615, this court said that "in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could have seen it if he had looked, and could have avoided the accident by stopping until it had passed by, he was negligent in not looking,"

and the action of the trial court in directing a verdict for defendant was approved and its judgment was affirmed.

In the course of the opinion in that case this court also cited Railroad Company *vs.* Houston, 95 U. S., 161, a case in which the plaintiff, Houston, sued the Chicago, R. I. & Pac. R. R. Co. for the negligent killing of his wife at a village street crossing, to the following effect:

> "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others.
>
> "Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. * * * Under these circumstances the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

And concluded the matter as follows:

> "These views concur with those laid down by the Supreme Court of Minnesota in Brown *vs.* R. R., 22 Minnesota, 165, and are in accord with the current of decisions in the courts of the States."

In view of the principles thus laid down, it would seem that the instruction of the trial court to the effect that the failure of the driver "to look up the track or to take any precautions" when he got within a certain distance of the railroad and could see it, it being broad daylight, and could have

checked his horses in time to have avoided the oncoming train was but "a minor degree of negligence," "a mistake on his part," "a want of ordinary care," which would "not defeat the entire action," but would only "affect the extent of the damages and make" them, if any were suffered, "correspondingly less," constitutes reversible error, and is so whether the defendant was itself guilty of negligence in failing to maintain gates and a watchman or not.

Upon the whole case, as well as upon the errors specifically pointed out, it is respectfully submitted that the judgment of the United States District Court for Porto Rico should be reversed and the case remanded with instructions to award a new trial.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 2398

(19,991.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

MOTION TO DISMISS.

Now comes the defendant in error, by his attorney, Frederick L. Cornwell, and moves the court to vacate the writ of error heretofore granted herein and to dismiss said cause for want of jurisdiction thereof in this court for the following reasons, to wit:

First. Because the judgment rendered in the court below against the plaintiff in error herein was less than the sum of five thousand dollars, to wit, the sum of one thousand six hundred dollars, as appears from the transcript of the record of said cause now on file in this court.

Second. Because the said plaintiff in error has not by his assignments of error brought before this court for review any claim or right under the Constitution or laws of the United States or any treaty thereof.

Third. Because the final judgment in said cause, if obtained in the Supreme Court of a Territory of the United States, could not be reviewed by writ of error from this court.

Wherefore the defendant in error moves the dismissal of said cause.

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1906.

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Plaintiff in Error,
vs.
JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

NOTICE OF MOTION TO DISMISS.

SIR: Please take notice that the defendant in error in the above-entitled cause will, on the 14th day of January, 1907, between the hours of 12 noon and 1 o'clock p. m. or as soon thereafter as counsel can be heard, in the Supreme Court room, in the city of Washington, D. C., in open court, move this court to vacate the writ of error heretofore granted herein and to dismiss said cause for want of jurisdiction thereof in this court for the following reasons, to wit:

First. Because the judgment rendered in the court below against the plaintiff in error herein was less than the sum of five thousand dollars, to wit, the sum of one thousand six hundred dollars, as appears from the transcript of the record of said cause now on file in this court.

Second. Because the said plaintiff in error has not by his assignments of error brought before this court for review any claim or right under the Constitution or laws of the United States or any treaty thereof.

Third. Because the final judgment in said cause, if obtained in the Supreme Court of a Territory of the United States, could not be reviewed by writ of error from this court.

Together with this motion the defendant in error serves upon said plaintiff in error a copy of his brief to be filed in the Supreme Court in support of said motion.

Dated Mayaguez, 8th day of November, 1906.

Very respectfully,

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

To FRANK H. DEXTER, Esq.,
Attorney for Plaintiff in Error.

Service accepted of copy of the aforesaid motion to vacate and dismiss and of brief in support thereof this 9th day of November, 1906.

FRANCIS H. DEXTER,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO,
Plaintiff in Error,
vs.
JULIO P. CASTRO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF ON MOTION TO DISMISS.

This suit was originally brought by Julio P. Castro, as plaintiff, for the recovery of damages for loss of life of the minor daughter of the said plaintiff on account of the fault and negligence of the defendant (Record, page 1). The cause proceeded to trial by jury, and the jury returned a verdict in favor of plaintiff in the sum of $1,600.

The errors assigned, as appears from the transcript of record, page 25, are the following:

1.

That the court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez and therefore, by virtue of the provisions of section 670 of the Revised Statutes of the United States, the district court of the United States for Porto Rico, had no jurisdiction to try this cause before a jury at such special term of the said court begun and held at the city of Mayaguez aforesaid.

2.

That the court erred in overruling defendant's demurrer to the complaint.

3.

That the court erred in overruling the objection of counsel for defendant to the following question: "Is there or is there not a gate there?" asked of the witness José Remote Fajardo

Also in overruling the objection of counsel for defendant to the following question: "Do you know of any other accident at this crossing, Mr. Fajardo?" asked of the witness Don Mateo Fajardo.

Also in overruling the objection of counsel for the defendant to the following question: "At that crossing state whether or not there ever was a gate and watchman?" asked of the witness Celso Leon.

Also in overruling the objection of counsel for the defendant to the following question: "State whether or not there was a watchman there?" asked of the witness Isaac Gonzalez.

4.

That the court erred in giving the following instructions during the course of the charge to the jury:

"It is contended on the part of the plaintiff that had this plain legal duty, devolving upon this company defendant, been performed — complied with on the occasion of this accident, that the accident could not have occurred. That is, if the gate had been across the crossing and the watchman there attending to his duties, it being at broad daylight, the accident would have been prevented, and that the failure to maintain a watchman and a gate at the crossing there was the cause, the efficient cause of this accident, and was such negligence in itself that made this company liable to the plaintiff for damages. The same law required other duties on the part of the company. It required duties that are known in other States as common-law duties, but they are incorporated in the laws of Porto Rico as part of the statute; that the whistle should be blown and the bell rung and the train slow up as it approached crossings of this character.

"Now, we start, gentlemen of the jury, with the confessed or proven failure of this company to maintain a gate or a watchman, as required by law, which is negligence in itself.

"Now, if from the evidence you find that the driver was not guilty of negligence to such an extent as to justify you in finding that it was gross, willful and wanton, but by the exercise of ordinary common sense, ordinary precaution, he had

time when he got within a certain distance of the railroad track to see it, five feet or ten off, whatever the testimony was, and he could have checked his horses, and he neglected to look up the track or to take any precautions, if you find that, that would be a minor degree of negligence. It would be a mistake on his part, and in that event you would be entitled to take that fact into consideration, of his negligence in not looking up and down the track or stopping when he got close enough to the track to see it. You would be justified and it would be your duty, if you believe the testimony on that subject, to take the testimony on that subject into consideration in cutting down or mitigating any damages you may be disposed to allow in the case.

"If the action of the driver, from the evidence was rash, wanton, willful and reckless in trying to cross the railroad track without looking, in the thought that he could cross before the train reached the crossing, and he made a mistake in his calculation and the train struck the hind part of that carriage and caused this unfortunate accident and the loss of life, then that is such reckless and wanton conduct as would defeat the action entirely, and your verdict would be for the defendant if you find that fact. On the other hand, if you find a lesser degree of negligence, amounting to what is called want of ordinary care that a prudent man would exercise in crossing that place, then you have a right to take that into consideration, not to defeat the entire action, but to affect the extent of damages and make the damages, if you find any were suffered, correspondingly less."

5.

That the court erred in reading from a law book upon the measure of damages, during the course of said charge, to the effect that damages are limited to the loss of comfort and society of the deceased.

6.

That the court erred in giving the following instructions requested by the plaintiff, together with modifications:

First. If you find a verdict in favor of the plaintiff, in determining the amount of the damages, you are instructed as follows: The laws of Porto Rico provide that a father may maintain an action for the death of his minor child, when

such death is caused by the wrongful act or neglect of another, that such damages may be given as, under all the circumstances of the case, be just. And in determining this question you are to take into consideration all the circumstances of the case, the age of the deceased, the kind of a girl she was, and take into consideration the assistance that she might have been to the parents in future years, and you may also consider the loss of society and comfort and the reliance that they could place upon her in future years. And you may take into consideration all these things in determining what the plaintiffs should receive as compensation for the loss they have received.

Answer. Gentlemen, that is the law properly stated and I affirm that point.

Second. The laws of Porto Rico require that where railroads cross other roads on the same level, gates shall be constructed which shall only be opened when vehicles and cattle cross the track, and if the jury believe from all the evidence in the case that the point where the accident happened was at the crossing of the public highway, extending between San German and Mayaguez, and the defendant's railroad tracks, and that at this crossing there were no gates as required by law, and that if the gates had been there and had been closed as the coach containing the deceased approached the said crossing, the accident would not have happened, then the jury will return a verdict for the plaintiff.

Answer. That point is affirmed. If the gate was up and closed and all, it is your duty to determine whether, as a matter of fact, from the evidence, the accident would have happened at all.

Third. The burden of proof of contributory negligence is on the defendant and must be proved by a preponderance of evidence.

Answer. That point is affirmed. The defense set up here is that the plaintiffs themselves were guilty of contributory negligence and not entitled to recover. Having undertaken to prove that, the burden is upon the plaintiff to prove it by a preponderance of the evidence. That does not mean the greater number of witnesses. You have a right to observe the character of the witnesses, their greater or less degrees of intelligence, their interest, their motives and greater opportunities for observing. You pass upon those questions in determining the question of preponderance of evidence.

7.

That the court erred in refusing to give to the jury the following instructions requested by defendant and in modifying same:

(5.) The court instructs the jury that at this railroad crossing the train of defendant company had the right of way and the agents and employés of defendant in charge thereof were held to the exercise of only ordinary care and diligence to avoid accidents at such crossings. And if you believe from the evidence that the fireman and engineer on the train which caused the accident gave the warning whistles and rang the bell as testified to by them, and upon the engineer seeing the coach at about fifty meters distant from the crossing both he and the fireman did all that they could reasonably do to stop the train and avoid the collision, then you will find for the defendant.

Which instructions the court modified as follows:

Answer. This instruction is affirmed with the qualification however, that the full performance of all duties imposed by law and the exercise of ordinary care to prevent the accident by stopping the train before the collision and accident, did not relieve defendant company from the further duty imposed by law to maintain a gate and watchman at said crossing as precautions to prevent accidents at crossing. Nor did absence of gate and watchman at crossing by defendant, facts, if well known for several years to the coachman and at time of accident, if you so find from the testimony, did not relieve plaintiff from the exercise of ordinary care, and if the coachman of plaintiff attempted to cross tracks, knowing and seeing no gate there, he was guilty of such contributory negligence, which, if jury finds to be only the want of ordinary care and negligence, should operate to reduce and mitigate amount of damages to plaintiff, if any are to be found by the jury. If the jury, however, should find that the driver of plaintiff, on approaching the tracks at the crossing and well knowing and observing no gate to be maintained at said crossing undertook without stopping or looking for trains on the track, and that the said driver of plaintiff whipped his horses and undertook to so cross the tracks under said circumstances in evidence, such action of driver would be such reckless, rash and gross negligence as to entirely defeat the right of plaintiff to recover in this action.

Rash, wanton or gross negligence in law operates to defeat a plaintiff's right to recover, but it is the duty of the jury and not of the court to find the fact and circumstances in evidence alleged to constitute either ordinary or gross, wanton negligence of plaintiff's driver.

(6.) If you believe from the evidence that coachman Rodriguez stopped at any place before reaching the crossing at a point where he could not see nor hear the approaching train and then started to cross the track without again stopping, looking or listening at any point up to the track itself, where, under the evidence, you may believe that he could have seen or heard the approaching train, this conduct on the part of the coachman was reckless and wanton and made him guilty of contributory negligence, notwithstanding you believe from the evidence that no chain, gate or watchman were at said crossing.

Which instruction the court modified as follows:

Answer. Affirmed with same qualifications as specified in the foregoing point regarding failure of duty of defendant under the law to maintain a gate and watchman at the crossing, and the correlative obligation of plaintiff's driver with knowledge of years and seeing at time the removal of gate to exercise a degree of ordinary care and prudence at so dangerous a crossing as the evidence tends to prove the one in dispute is.

(9.) The court instructs the jury that defendant company was not obliged to maintain a chain, gate or watchman at the crossing, where the accident occurred and that it and its servants and employés in the operation of the trains were only held to the exercise of ordinary diligence in avoiding accident at that place.

Which instruction the court modified as follows:

Under existing laws of Porto Rico continued under the express provisions of the Foraker law and amendments, under which Congress of the United States created government of Porto Rico, the police regulations governing operation of railroads, requiring maintenance of gates at crossing of railroad for safety of human life is compatible with the laws of the United States and of Porto Rico, never having been repealed. This point as stated is refused.

(10.) As to ordinary diligence and reasonably safe appliances the court is asked to instruct the jury that they will take into consideration the character of the railway, the

purposes for which it was used, the general nature of the country and the demands of the people, and you are instructed that under all those circumstances defendant company was only required to use ordinary safe appliances and locomotives and cars and was not required to have as high a degree of perfection as may exist in the best railways of the world.

Which instruction the court modified as follows:

Answer. All this instruction is affirmed as law, but with the qualification that all this care, caution and exercise of high order of care by defendant must be considered with reference to the duty imposed by law to maintain a gate at the grade crossing in question and a failure of duty of defendant to maintain said gate.

(11.) The jury are instructed that if you should decide to award damages to plaintiff, you can only allow such damages as have been proven in the case. And if you believe from the evidence that plaintiff, because of his position, has not been deprived of any financial support or assistance by reason of the death of his said daughter, then you cannot award any damages to plaintiff therefor.

You are further instructed that in awarding damages you are not at liberty to allow damages on the ground of sympathy, sentiment of speculation, but such damages must be the result of positive proof and of financial or pecuniary loss clearly established by preponderance of the evidence.

Which instruction the court modified as follows:

Answer. The words of the law require, if you find for plaintiff under the evidence, that you allow such damages as you may, under the evidence and circumstances, consider as just, and with this qualification, this instruction is affirmed.

8.

That the court erred in entering judgment in favor of the plaintiff and against defendant for the sum of sixteen hundred dollars ($1600.00).

ARGUMENT.

The only assignment of error which in any way attempts to raise a Federal question is number 1.

"That the court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of section 670 of the Revised Statutes of the United States, the district court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said court begun and held at the city of Mayaguez aforesaid."

And we contend that section 670 of the Revised Statutes of the United States is without application to the United States district court for Porto Rico, and that therefore no Federal question is involved. The United States district court for Porto Rico is neither a circuit nor a district court of the United States within the meaning of the Constitution and the United States statutes.

Only those courts are constitutional courts which are organized by Congress within the States; those organized in any of the territory belonging to the United States and not included within a State are called legislative or congressional courts. They may have all the jurisdiction of "district and circuit courts of the United States," but are not such.

"It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested 'in one Supreme Court and in such inferior courts as Congress shall from time to time ordain and establish.' Hence it has been argued, that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

"We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges both of the

supreme and inferior courts, shall hold their offices during good behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are vested is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised *in the States* in those courts only which are established in pursuance of the 3rd article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a State government."

American, etc., Ins. Co. *vs.* 356 Bales of Cotton (Canter, claimant), 1 Pet., 511.

To the same effect see the following:

Clinton *vs.* Englebrecht, 13 Wall., 434.
Reynolds *vs.* United States, 98 U. S., 145.
McAllister *vs.* United States, 141 U. S., 174.
The Coquitlam, 163 U. S., 346.
United States *vs.* McMillan, 165 U. S., 501.

The district courts of the United States organized in the States under article 3 of the Constitution are distinct from the circuit courts of the United States organized in like manner, but under the organic acts of the Territories the court is one only, though exercising the combined jurisdiction of the circuit and district courts of the United States.

"By the organic act of the Territory of Utah, as of other Territories of the United States, the legislative power of the Territory extended only 'to all rightful subjects of legisla-

tion, not inconsistent with the Constitution and laws of the United States,' all statutes of the territory, if disapproved by Congress, were 'to be null and of no effect,' and the Constitution and all laws of the United States, not locally inapplicable, were extended over and declared to be in force in the Territory (U. S. Rev. Stats., secs. 1850, 1851, 1891).

"In each Territory, the supreme court and the district courts were established, the general nature of their jurisdiction defined, and the mode of appointment of their clerks prescribed by Congress, as appears in U. S. Rev. Stat., tit. 23. By sec. 1865 of those statutes the district courts were to be held by one of the justices of the Supreme Court of the Territory, appointed by the President under the Constitution and laws of the United States. The district courts of the Territory were vested, by sec. 1868, with general 'chancery as well as common-law jurisdiction' and by sec. 1910, with 'the same jurisdiction in all cases under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States' with a right of appeal to the Supreme Court of the Territory; and by sec. 1871 it was provided that there should be but one clerk of each district court in the Territory, appointed and designated by the presiding judge, as well as that 'only such district clerks' should be entitled to a compensation from the United States.

* * * * * * *

"Congress then, in the exercise of its sovereign and supreme power of legislation over the Territories of the United States, had extended, in the clearest and fullest manner, to the clerks of the district courts of the Territories, all the provisions of the statutes of the United States, establishing a fee bill, and restricting both the sums of the fees and emoluments to be received and the maximum amount thereof to be retained by the clerks of the United States held within a State. * * *

"Among the provisions of the act of 1853, and of U. S. Rev. St., tit. 13, chap. 16, expressly extended by Congress to the Territories, is the provision that the maximum personal compensation of a clerk of a district court or of a circuit court of the United States shall be no greater if he holds both clerkships than if he holds only one. This clearly indicates the intention of Congress that the maximum compensation of a clerk of a territorial district court should not be

increased even if his fees and emoluments were derived from two distinct sources of authority.

"But the fees and emoluments of the appellee were *not* derived from two offices or from two sources of authority, but from a single office and a single appointment. Each district court of the Territory, vested by Congress with the *jurisdiction which the circuit and district courts of the United States have* over cases arising under the Constitution and laws of the United States, and also with general jurisdiction at law and in equity, was, in the execution of either branch of its authority, *whether exercising Federal or general jurisdiction, one and the same court*, deriving its existence and its judicial powers from Congress; and its clerk, whether dealing with Federal or territorial business, was one and the same clerk, holding a single appointment under an act of Congress and from a judge commissioned by the President of the United States."

To the same effect see the following:

City of Panama, 101 U. S., 453,

in which it is said:

"Such jurisdiction of the territorial district courts within the respective districts is made coextensive with both the Federal circuit and district courts, for reasons which will be obvious to any one who will compare the two sections, one with the other, in their practical operation. *Two* classes of courts are created in the *Federal system* for the exercise of the necessary original jurisdiction, but *in the Territory*, as provided in the organic act, there is but *one class* of courts created for that purpose. Had Congress limited the jurisdiction of the territorial district courts to that exercised by the Federal district courts, then those courts could not have taken cognizance of controversies in patent cases nor of crimes and offenses against the authority of the United States, where the punishment is death, and if their jurisdiction had been limited to that exercised by the circuit courts, then those courts would have had no cognizance whatever of admiralty and maritime causes, or of seizures on water where the proceeding is according to the course of the admiralty law. * * * Two examples of courts having such jurisdiction are found in the 10th section of the judiciary act,

where the Federal district courts in two districts were empowered to exercise jurisdiction in addition to what was conferred by the 9th section of the judiciary act of all other causes, except appeals and writs of error, made cognizable in a circuit court, and with authority to proceed therein in the same manner as a circuit court."

Laws held to be "not locally inapplicable" under that wording in a statute are those of a general nature and not those special laws which apply in terms to "the courts of the United States," which latter are only applicable when the statute specifically so directs.

"The district and circuit courts mentioned in the act of 1891, (creating the circuit courts of appeals) and whose final judgments may be reviewed by the circuit courts of appeals, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely: Constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited, and the judges of which are entitled by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. * * * It necessarily results that the circuit court of appeals for the ninth circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the Act of March 3, 1891."

"By section 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States. * * *

"Sec. 808 (U. S. Rev. Stats.) was not designed to regulate the impaneling of grand juries in all courts where offenders

against the laws of the United States could be tried, *but only in the circuit* and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being."

Reynolds *vs.* United States, 98 U. S., 145.

And this would be the result with our court were it not for the express provision of the Foraker bill (sec. 34) that it shall proceed in the cases of which it has cognizance "in the same manner as a circuit court." But there is not a syllable in that or any other law which makes applicable any special statute except those governing *proceedings in cases.*

"A clause in the 13th section of the act, however, has been referred to, by which it is declared 'that the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere in the United States:' and it is argued that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of Congress are imported into the practice of the territorial courts. But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a Territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the Supreme Court of the Territory; but in a just sense it is so. The law has no specific application to this court, and cannot be applied to the territorial court without an evident misconstruction of the true meaning and intent of Congress in the clause of the 13th section above referred to. That clause has the effect, undoubtedly, of importing into the Territory the laws passed by Congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application; but not those of specific application.

"The acts of Congress respecting proceedings in the United States courts *are concerned with, and confined to,* those courts considered as parts of the Federal system, and as invested with the judicial power of the United States *expressly conferred by the Constitution,* and to be exercised in correla-

tion with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction."

Hornbuckle *vs.* Toombs, 18 Wall., 648.

Nothing could be plainer than the foregoing in holding that the statutes regulating *pleadings and proceedings* in "the courts of the United States" are restricted in their application to the constitutional courts. The same conclusion must necessarily follow as to those statutes regulating the *terms* of such district or circuit courts, the business to be transacted at those terms, and all other matters covered by statutes of *specific application,* to quote the language of the Supreme Court.

The difference between the two, so far as our court is concerned, consists in the fact that pleadings and proceedings have been provided for by the express and specific adoption of the same as in the circuit courts of the United States, while no other regulations governing the constitutional courts—and least of all the distinction between district and circuit court terms—have been either specifically or impliedly adopted. Hence they can have no application.

The argument that the question of whether a jury can be summoned and jury trials had at a particular term is included within the provision that this court, in cases cognizant in the circuit courts of the United States, "shall proceed *therein* in the same manner as a circuit court," is too specious and frivolous to require reply. The word "special" as applied to the terms at Mayaguez was evidently used as distin-

guished from "regular" applied to the terms at San Juan and Ponce, in that the *time* of the convening of terms in the latter cities was *regularly* fixed by the law, while the time of such terms at Mayaguez remained to be specially fixed whenever the judge might deem them expedient.

Respectfully submitted,

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

FILE COPY.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO.

BRIEF FOR DEFENDANT IN ERROR.

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24546

(19,991.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 151.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

JULIO P. CASTRO, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

This suit was originally brought by Julio P. Castro, as plaintiff, for the recovery of damages for loss of life of the minor daughter of the said plaintiff on account of the fault and negligence of the defendant (Record, page 1). The cause proceeded to trial by jury, and the jury returned a verdict in favor of plaintiff in the sum of $1,600.

ARGUMENT.

As to the jurisdiction of this court over the case, the amount involved, as shown from the record, is only $1,600; so that the court is without jurisdiction, unless "the Constitution of the United States or a treaty thereof or an act of Congress is brought into question and the right claimed thereunder is denied."

The only error assigned by the plaintiff in error which in any way attempts to raise a Federal question is No. 1:

"That the court erred in overruling the plea to the jurisdiction herein, for the reason that this action was instituted and tried at a special term (there being no regular term authorized by law to be held) in the city of Mayaguez, and therefore, by virtue of the provisions of section 670 of the Revised Statutes of the United States, the district court of the United States for Porto Rico had no jurisdiction to try this cause before a jury at such special term of the said court begun and held at the city of Mayaguez aforesaid."

Section 670 of the Revised Statutes of the United States reads as follows:

"At any special term of a circuit court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia, and Wisconsin, any business may be transacted which might be transacted at any regular term of such court. At any special term of a circuit court in any other district, it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motion for a new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other proceedings, in all causes pending in the circuit court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court."

We contend, *first*, that section 670 of the Revised Statutes is without any application whatever to the United States district court for Porto Rico, and that therefore no Federal question is involved in this case; and, *second*, that any decision of the lower court regarding section 670 of the Revised Statutes was, at most, but a construction of the terms of the statute and was not a denial of the validity of the statute.

"Where no question is raised as to the validity of a statute of the United States, but merely as to the application of the statute to the case, no Federal question arises."

Colin Cameron, appt., *v.* United States, 146 U. S., 533 (36:1077).

"The substance, therefore, of the assignment of errors, is simply that the court below misconstrued the acts, and the errors which it is sought to have this court review are all of them errors of interpretation. Such error raises no Federal question reviewable by this court."

Adams *v.* Preston, 63 U. S., 22 How., 473 (16:273); Congdon *v.* Goodman, 67 U. S., 2 Black, 574 (17:257); Scott *v.* Jones, 46 U. S., 5 How., 343 (12:181); Smith *v.* Adsit, 83 U. S., 16 Wall., 185 (21:310); Klinger *v.* Missouri, 80 U. S., 13 Wall., 257 (20:365); Murray *v.* Gibson, 56 U. S., 15 How., 421 (14:755); Nichol *v.* Levy, 72 U. S., 5 Wall., 433 (18:596); Jackson *v.* Lamphire, 28 U. S., 3 Pet., 280 (7:679); Withers *v.* Buckley, 61 U. S., 20 How., 84 (15:816); Medberry *v.* Ohio, 65 U. S., 24 How., 413 (16:739); Porter *v.* Foley, 65 U. S., 24 How., 415 (16:740); Commercial Bank of Cincinnati *v.* Buckingham, 46 U. S., 5 How., 343 (12:181); McNulty *v.* California, 149 U. S., 647 (37:883).

State of Conn. *v.* G. M. Woodruff, 153 U. S., 869.

In Snow *v.* United States, 118 U. S., 346, 363 (30:207–209), in which it was contended that a court established by act of Congress and admitted to have a lawful existence and jurisdiction of the case misconstrued the act and went beyond the authority which it conferred, it was held that all that was

drawn in question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States," within the meaning of the act of March 3, 1885, chap. 355.

See also Clugh *v.* Curtis, 134 U. S., 361, 370 (33: 945, 949).

Only those courts are constitutional courts which are organized by Congress within the States; those organized in any of the territories belonging to the United States and not included within a State are called legislative or congressional courts. They may have all the jurisdiction of "district and circuit courts of the United States," but are not such.

Clinton *v.* Englebrecht, 13 Wall., 434.
Reynolds *v.* United States, 98 U. S., 145.
McAllister *v.* United States, 141 U. S., 174.
The Coquitlan, 163 U. S., 346.
United States *v.* McMillan, 165 U. S., 501.

The district courts of the United States, organized in the States under article 3 of the Constitution, are distinct from the circuit courts of the United States, organized in like manner, but under the organic acts of the Territories the court is one only, though exercising the combined jurisdiction of the circuit and district courts of the United States.

See City of Panama, 101 U. S., 453, in which it is said:

"Such jurisdiction of the territorial district courts within the respective districts is made coextensive with both the Federal circuit and district courts, for reasons which will be obvious to any one who will compare the two sections, one with the other, in their practical operation. Two classes of courts are created in the Federal system for the exercise of the necessary original jurisdiction, but in the Territory, as provided in the organic act, there is but one class of courts created for that purpose. Had Congress limited the jurisdiction of the territorial district courts to that exercised by the Federal district courts, then those courts could not have taken cognizance of controversies in patent cases nor of

crimes and offenses against the authority of the United States, where the punishment is death, and if their jurisdiction had been limited to that exercised by the circuit courts, then those courts would have had no cognizance whatever of admiralty and maritime causes, or of seizures on water where the proceeding is according to the course of the admiralty law. * * * Two examples of courts having such jurisdiction are found in the 10th section of the judiciary act, where the Federal district courts in two districts were empowered to exercise jurisdiction in addition to what was conferred by the 9th section of the judiciary act of all other causes, except appeals and writs of error, made cognizable in a circuit court, and with authority to proceed therein in the same manner as a circuit court."

"By section 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States." * * *

Section 34 of the Foraker act makes the following provision as to terms of court:

* * * "Regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient." * * *

And section 35 provides, as to appeals to the Supreme Court of the United States, as follows:

"That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States, and

such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the United States."

The word "special," as used in section 34 of the Foraker act, regarding the terms at Mayaguez, was evidently used in contradistinction to "regular" terms, applied to the terms to be held at San Juan and Ponce, in that the *time* of convening terms in the latter cities was *regularly* fixed by the Foraker act itself, while the terms at Mayaguez were left to be *specially* fixed at such times as "the judge may deem expedient."

A case illustrating this use of "special term" is that of Gonzalez *versus* Cunningham, 164 U. S., 613; L. ed., 41, 573—an appeal from the Territory of New Mexico. There was a provision in the law that—

"Said special term shall not conflict with a term of said district court in any other county in the same judicial district. Said terms to be called in the same manner now provided by law for the holding of special terms of the district courts in this Territory." * * *

And the exception to the jurisdiction of the lower court was based on the fact that the court had proceeded with the case at a special term, after the time had commenced for holding a regular term of court, and that the sentence was pronounced after such special term had by the statute lapsed.

The court say:

* * * "From the various provisions of the acts referred to, it appears that no specific duration of either regular or special terms was prescribed by law, but that they were subject, when lawfully commenced, to be continued until ad-

journed by order of court, and that therefore they could not be necessarily determined by the advent of the particular days designated for the commencement of regular terms; and that special terms might be ordered when regular terms failed to be held, and also whenever in the discretion of the judge of any district court a furtherance of justice required it.

"Under section 552, which was section 3 of chapter 26 of the Laws of 1874, when special terms were held because the regular term had failed, it was provided that any such special term should not conflict with the regular term in any other county in the same judicial district, that is, that it should not be so called as to produce a conflict or be held in actual conflict; while by section 3 of chapter 27 of the Laws of 1874, being section 552*a*, no specific limitations were imposed in respect of a special term called thereunder. There was nothing in any of these provisions which controlled the discretion of the trial judge in continuing any special term he may have been holding until a pending case was concluded, and nothing which operated to invalidate the proceedings of such special term because prolonged beyond the day fixed for a regular term." * * *

The *second assignment of error* is "that the court erred in overruling defendant's demurrer to the complaint." (See Record, page 4.)

The Supreme Court has repeatedly held that an exception to the overruling of a demurrer, where the party afterwards pleads to the merits of the case, is not an assignable error. (See case of Campbell *v.* City of Haverhill, 155 U. S., 610; United States *v.* Boyd, 46 U. S., 29; Campbell *v.* Wilcox, 77 U. S., 421. And, furthermore, the demurrer itself was without merit.

Sections 60 and 61 of the Code of Civil Procedure for Porto Rico, adapted in March, 1904, provide as follows regarding recovery for death:

"SEC. 60. A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is

caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

"SEC. 61. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. *In every action under this and the preceding section such damages may be given as under all the circumstances of the case be just.*"

So that under the provisions of the preceding sections the only limitation for recovery upon the death of a minor is that "such damages may be given as under all the circumstances of the case be just."

As to *assignment of error No. 3,* the record fails to disclose that the answers to the questions excepted to were in any way detrimental to the case of the plaintiff in error.

As to *assignment of error No. 4,* the part of the judge's instruction excepted to is so long and involves so many different statements that counsel is at a loss to know just what statement of law made by the court the plaintiff in error relies upon, and will but cite to the court the sections of the railroad law of Porto Rico which require railroads to maintain a gate and watchman.

Article 8 of the Police Law of Railroads of Porto Rico provides, among other things, "When railroads cross other roads on the same level, gates shall be constructed which shall be closed and only opened when vehicles and cattle cross as provided for in the regulations;" and article 18 of the Regulations for the Application of the Police Law of Railroads provides: "By all possible means, the company shall assure—(1) the maintenance in good condition of the railroad and all its appurtenances, (2) the care and service of the gates in the level crossings." These provisions of the railroad law are

still in force in Porto Rico, there having been no change or amendment in regard to them.

As to *assignment of error No. 5*, "that the court erred in reading from a law book upon the measure of damages, during the course of said charge, to the effect that damages are limited to the loss of comfort and society of the deceased," if the court did read the preceding paragraph to the jury, the error, if any, is one of which the plaintiff in error may not take advantage, as any error there might have been would have been detrimental to the interest of the defendant in error and not to the plaintiff in error. This court has repeatedly held that in order that an appellant may avail himself of an error, it must be material and detrimental to his interest.

Assignments of error Nos. 6 and 7 both violate rule 35 of the Supreme Court, in that they do not set out separately and particularly each error asserted and intended to be urged.

Assignment of error No. 8, "that the court erred in entering judgment in favor of plaintiff and against defendant for the sum of sixteen hundred dollars ($1600.00)," is not an assignable error. This court has repeatedly held that where the error complained of is in effect that the decision was for the wrong party, it is too general in its terms to be reviewed by this court. (See Scholey *v.* Rew, 23 Wall., 331.)

Wherefore counsel for defendant in error respectfully prays that the writ of error be dismissed, or that the judgment of the United States district court for the district of Porto Rico be affirmed.

Respectfully submitted,

FREDERICK L. CORNWELL,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 151.—October Term, 1906.

The American Railroad Company of Porto Rico, Plaintiff in Error, vs. Julio P. Castro. | In error to the District Court of the United States for the District of Porto Rico.

[February 25, 1907.]

Julio P. Castro, defendant in error, was plaintiff in the court below, and the defendant in error, the American Railroad Company, a New York corporation doing business in Porto Rico, was defendant. The action was commenced by the filing of a complaint in the office of the clerk of the court at Mayaguas, Porto Rico. Damages in the sum of fifteen thousand dollars were prayed, because of the alleged negligent killing of the daughter of the plaintiff by a train of the company, whilst she, with other persons, were attempting to pass, in a vehicle, over the railroad of the defendant, at a point where it intersected a public highway leading from the town of San German to the town of Mayaguez.

A demurrer to the complaint was filed, and also the following plea to the jurisdiction of the court:

"Defendant, in the above-entitled action, comes now, by its attorney, F. H. Dexter, and objects to the jurisdiction of this court to try this cause under the terms and provisions of section 670 of the Revised Statutes of the United States, for the reason that all terms of this court held in the city of Mayaguez, under and by the the terms and provisions of the act of March 12, 1900, creating a civil government in Porto Rico, and particularly the present term at which the above cause is set for trial, is a special term of this court, and, therefore, this court is without jurisdiction to try the issues in this cause by a jury.

"Wherefore, defendant prays for an order either dismissing this cause or transferring the same for trial at a regular term of this court to be held at either San Juan or Ponce."

After the entry of an order overruling the demurrer and the plea to jurisdiction, an answer was filed and the case was tried by a jury. A verdict was rendered in favor of the plaintiff for the sum of sixteen hundred dollars. The objection to jurisdiction was renewed in a motion to arrest the judgment, and after the overruling thereof a bill of exceptions was settled by the trial judge, containing exceptions taken during the

trial to the admission and rejection of evidence and to instructions given and refused. The case was then brought to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

By the act of April 12, 1900, (31 Stat. L. 85, chap. 191,) the general rule governing the right of this court to review by writs of error or appeal final decisions of the District Court of the United States for Porto Rico was made as to amount to conform to that obtaining as to the Territories of the United States, viz., five thousand dollars. As this case does not involve the requisite jurisdictional amount, it follows that the right of review does not exist unless the case is within the provision of the statute conferring jurisdiction to review in this court "in all cases where . . . an act of Congress is brought in question and the right claimed therein is denied."

It has been settled that where, in the course of litigation pending in the court just referred to, a party asserts a right under an act of Congress, the act "is brought in question," and when the right so claimed is denied the case can be brought here. (*Serralles* v. *Esbri*, 200 U. S. 103; *Rodriguez* v. *United States*, 198 Ib. 156; *Crowley* v. *United States*, 194 Ib. 466.)

It is undoubted that the plea to the jurisdiction filed and insisted upon below asserted on the record a right under an act of Congress, which right was denied. But in harmony with the rule which governs where a right under the Constitution, etc., of the United States is asserted in a case which is brought to this court from a State court and in accord with the same rule which also governs cases originally brought in a court of the United States, (*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, and cases cited; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561,) we are of opinion that the mere assertion of a Federal right and its denial do not justify our assuming jurisdiction where it indubitably appears that the Federal right asserted is frivolous, that is, without color of merit. We think the case at bar is of this character.

As appears in the Revised Statutes it has been the uniform practice of Congress to fix both the time and place for holding sessions of the district and circuit courts of the United States, which, for convenience of expression, have been styled the regular terms of court. (Rev. Stat. secs. 572, 658.) Upon the district judge has also been conferred the power of designating the time and place of holding special terms of the district court, in which any business might be transacted which might be disposed of at a regular term. (Ib. sec. 581.) The asserted application to the District Court of Porto Rico of the provision as to special terms of the circuit courts is that upon which was rested the claim of statutory right to exemption

from a trial of the cause by a jury at Mayaguez, which was denied by the court below, and forms the basis for the contention that this court must exercise jurisdiction to pass upon the assigned errors. The section reads as follows:

"SEC. 670. At any special term of a Circuit Court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia and Wisconsin any business may be transacted which might be transacted at any regular term of such court. At any special term of a Circuit Court in any other district it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motions for a new trial and all other motions, and to award executions and other final process, and to do and transact all other business and direct all other proceedings in all causes pending in the Circuit Court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court."

The application of this section, it is contended, results from the concluding words of the following portion of section 34 of the act of April 12, 1900:

"The District Court of the United States for Porto Rico . . . shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court."

Rev. Stat. sec. 670 is to be interpreted in the light of section 669, reading as follows:

"SEC. 669. In the districts not mentioned in the five preceding sections [California, Oregon, Nevada, Kentucky, Indiana, Tennessee, North Carolina, Virginia and Wisconsin being the districts mentioned] the presiding judge of any circuit court may appoint special sessions thereof, to be held at the places where the regular sessions are held."

Keeping in mind that the substantially uniform rule stated in Rev. Stat. secs. 664 to 669 requires the holding of special terms of a circuit court at the place where the regular sessions are authorized to be held, it follows that a special term of a circuit court of the United States, as the expression is employed in Rev. Stat. sec. 670, is a session ordered for the disposal of business, supplementary to a regular term, and to be held at the place fixed by Congress for holding such regular term. When the plain result of the legislation just referred to is noted it is apparent that there is no color whatever for the pretension that Rev. Stat. sec. 670 had any possible application to the term at which this case was tried. That term was held under authority conferred by that portion of section 34 of the act of April 12, 1900, where, referring to the District Court of Porto Rico, it was provided:

"Regular terms of said court shall be held in San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other times as said judge may deem expedient."

On the face of this provision it is apparent that it was the intention of Congress to authorize the holding of sessions of the court at Mayaguez at times to be *specially* designated by the district judge. It can not be said that the word special in the act was intended to affix to the terms authorized by Congress to be held at Mayaguez the character of special terms, as contradistinguished from regular terms, within the purview of Rev. Stat. sec. 670, without reducing the statute to an absurdity, for unless the act authorized the holding of regular terms at Mayaguez it would be impossible to conceive of the holding of special terms at that place in the sense of Rev. Stat. sec. 670. What the provision in question plainly meant was that regular terms should be held at Ponce and San Juan at the times fixed by Congress in the statute and that the same character of term might be held at Mayaguez at a time to be specially designated by the district judge.

Dismissed for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 467.—October Term, 1906.

The American Railroad Company of Porto Rico, Plaintiff in Error, vs. Felicia Cardona de Castro and Julio Castro, her husband.	In error to the District Court of the United States for the District of Porto Rico.

[February 25, 1907.]

Mr. Justice White delivered the opinion of the Court.

This case is similar in character to that of *American Railroad Co.* v. *Julio P. Castro*, No. 467, this term, just decided, having been brought to recover for damages resulting from injuries sustained by the wife in the same accident which occasioned the death of the daughter Eloisa. The right of this court in the case at bar to review a judgment for the plaintiffs below, entered upon the verdict of a jury, is based upon an objection to the jurisdiction of the trial court similar to that which was made in No. 151. For the reasons stated in the opinion in that case the writ of error in this case must also be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.